IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-476

TOWNS OF NORWOOD, CONCORD AND WELLESLEY, MASSACHUSETTS,
Petitioners,

v.

BOSTON EDISON COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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September 26, 1977

WILSON - EPES PRINTING CO., INC. - RE 7-6002 - WASHINGTON, D. C. 20001

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Pursuant to Rule 31 of the Rules of the Supreme Court of the United States, the indicated Town Petitioners, three municipal utilities who are all requirements customers of the Boston Edison Company, Respondent, hereby request that a writ of certiorari issue to review opinions and orders entered by the United States Court of Appeals for the District of Columbia Circuit on May 17, June 27 and July 28, 1977 in *Boston Edison Company* v. *Federal Power Commission*, Nos. 75-2123, 76-1392. The Opinion of May 17, 1977 is reported at 557 F.2d 845. The remaining Orders are unpublished and are reproduced in Appendix A hereto. By these Opinions and

Orders, the Court of Appeals ignored contemporaneous construction by the Commission and held arbitrary and beyond discretion the Federal Power Commission's interpretation and application of a regulation pertaining to rate filings by which it rejected the rate filing of Respondent for noncompliance. The Court of Appeals by ignoring the Commission's contemporaneous construction of its regulation held that the Commission had applied a new standard to Respondent without notice. The Court directed that Respondent be put in the position it would have been in had the Commission not rejected Respondent's initial filing and thereby fashioned a remedy which would force the Petitioners to pay to the utility revenues never collected on the basis of and for a period in which the subject rate schedule was not in effect.

OPINIONS BELOW

The principal Opinion of the Court of Appeals entered on May 17, 1977, which is the subject of this Petition, is reported at 557 F.2d 845 and is also set forth in Appendix A-1 hereto. The other orders of the Court of Appeals which are the subject of this Petition are unpublished and are set forth in Appendix A as follows: Order of June 27, 1977 Denying Rehearing (Appendix A-2); Order of June 27, 1977, Denying Rehearing En Banc (Appendix A-3); Order of July 28, 1977 Granting Motion for Instructions in the Mandate for Allowance of Interest (Appendix A-4). The Orders of the Federal Power Commission entered in the instant proceeding are its Orders of September 24, November 11 and November 14, 1975. None of these Orders is reported. They are set forth in Appendix B-1 hereto. Other Orders of the Federal Power Commission relevant to this matter are set forth at Appendices B-2.

JURISDICTION

The Opinions and Orders of the Court of Appeals which are the subject of the instant petition were entered on May 17, June 27 and July 28, 1977 and are set forth in Appendix A hereto. Jurisdiction of this Court is invoked pursuant to Section 1254 of the Judicial Code, 28 U.S.C. § 1254 and Section 313(b) of the Federal Power Act, 16 U.S.C. § 825*l*(b).

QUESTIONS PRESENTED

1. Did the Court of Appeals in reversing the Federal Power Commission and directing it to allow a regulated utility to put into effect on a retroactive basis a previously rejected rate filing based on stale factual data, err in not applying the rule of deference established in *Udall* v. *Tallman* and substitute its own construction of an administrative regulation for the contemporaneous interpretation of that regulation by the Commission when the Commission's interpretation is neither plainly erroneous nor inconsistent with the regulation.

2. Can the Court of Appeals devise a remedy for Commission error which would irreparably injure wholesale customers that relied upon the legitimacy of the Commission's application of its regulations by forcing them to pay over to their supplier revenues which they have never collected.

STATUTE INVOLVED

The statute involved is Section 205(d) of the Federal Power Act, 16 U.S.C. § 824d(d) attached as Appendix E.

PROPRIETY OF RELIEF REQUESTED

The Petitioners, municipal wholesale customers of the Respondent, relied upon the legitimacy and reasonableness of an apparently valid Order of the Federal Power Commission interpreting and applying its filing regula-

tions and pursuant thereto rejecting Respondent's rate filing. This rejection was later found by the Court of Appeals to be technically in error and the Court of Appeals set as a remedy the placement of Respondent in the position it would have been in had the rate filing been accepted for filing. Petitioners assert that the Opinion of the Court of Appeals has so far departed from the accepted and usual course of judicial procedure in respect to deference to an administrative agency's interpretation of its regulation so as to warrant this Court's intervention. Further, even if the Court of Appeals be correct in putting aside the Commission's interpretation of its regulations, the remedy it directs flies in the face of this Court's repeated admonitions that the consumer be protected from exploitation at the hands of utilities. As the result of the remedy fashioned by the Court of Appeals, Petitioners are placed in the role of insurers against the errors of the Commission. The Petitioners would be forced to pay over to a Respondent revenues they never collected, based on the rate schedule which was not in effect during the time for which payment is sought.

STATEMENT OF THE CASE

On July 17, 1973 by FPC Order No. 487, 50 F.P.C. 125,[1] the Federal Power Commission issued an amendment to Section 35.13 of its regulations under the Federal Power Act. The Commission required

> all electric utilities that apply for rate increases in excess of $50,000 annually to file unadjusted cost of service data *for the most recent twelve consecutive months of actual experience* plus estimated cost data for the twelve month period beginning three months after the end of the twelve months of actual data."[2]

[1] Rehearing was denied in 50 F.P.C. 736 (1973), *affirmed* in American Public Power Association v. FPC, 522 F.2d 142 (1975).

[2] 50 F.P.C. at 125; emphasis added.

In that Order, the Commission responded to comments and criticisms on the proposed length of Periods I and II [3] as follows:

> Several companies while indicating approval stated that the three months between Period I and Period II is too short. It was suggested that the Period II be made more flexible by limiting Period II to any twelve month period but no later than the proposed effective date. Others hoped for Period II to begin the first full month following the proposed effective date and a few companies want Period II to commence when billings under proposed rates are first made. Upon further review of the make up of Period II, we conclude that that period should be made more flexible by designating it as any twelve consecutive month period beginning after Period I but no later than the date on which the new rates become effective. This change will permit companies to file costs projected on a calendar year basis if they so desire.
>
> Some companies recommended that Period I should be not more than four to six months prior to the filing date of a rate case. Others indicated that it would facilitate the compilation of cost of service data if Period I were the most recent calendar year and Period II were the first full calendar year after the effectiveness of the new rates. Our review of the comments which suggest changes to the proposed Period I does not alter our belief that *Period I should be the most recent available data* with which to analyze the normality or abnormality of estimated costs *vis a vis* actual historical experience.[4]

The final regulation which became effective October 15, 1973 made it clear that the Commission was concerned

[3] Period I was to represent the latest year of actual data, Period II to represent a future test year based on estimated data. See 50 F.P.C. 125 (1973).

[4] 50 F.P.C. at 128; emphasis added.

with obtaining the most recent twelve months of actual data in Period I.

Section 35.13(b) (4) (iii)

(iii) *The statement of the cost of service should contain unadjusted system costs for the most recent twelve consecutive months for which actual data are available (Period I)* including return, taxes, depreciation, and operating expenses, and an allocation of such costs to the service rendered. The statement of cost of service shall include an attestation by the chief accounting officer or other accounting representative of the filing public utility that the cost statements and supporting data submitted as a part of the filing which purport to reflect the books of the public utility do, in fact, set forth the results shown by such books. Following is a description of statements A through O required to be filed pursuant to this subparagraph. In addition, the public utility shall file statements A through O together with related work papers based on estimates for any twelve consecutive months beginning after the end of Period I but no later than the date the rates are proposed to become effective (Period II). Full explanation of the bases of each of the estimated figures shall be included, Period II shall be the "test period".[5]

The Commission also indicated that it would entertain requests for waiver of the filing requirements for good cause shown.[6]

The Commission's first reported application of this regulation took place in *Minnesota Power & Light Company*, Docket No. E-8494. Minnesota in its filing of November 16, 1973 utilized calendar year 1972 as Period I and calendar year 1974 as Period II:

[5] Appendix D-1 hereto; emphasis added.

[6] 50 F.P.C. at 128.

The Company's use of calendar year 1972 as "Period I" of its submittal is designed to facilitate comparison of that period with the calendar year 1974 test period and to enable more ready reference to the Company's FPC Form No. 1. The Company believes that the use of two calendar years provides more accurate comparisons of the Company's costs and earnings than use of a period ending some time during the calendar year. However, if required by the Commission, the Company will prepare an updated cost of service presentation for Period I."[7]

The Commission responded on December 6, 1973 with an interpretation of Order 487 which made it clear that calendar year based data were not acceptable unless they were also the most recent actual data available to the Company:

By letter dated November 18, 1973, you transmitted for filing a proposed increase in rates for wholesale electric service to 18 municipalities, two rural electric cooperatives and one privately-owned electric system. Your filing is deficient with respect to certain requirements of the Commission's Regulations under the Federal Power Act.

* * * *

Pending receipt of the above information a filing date will not be assigned to your submittal.

* * * *

As further clarification of the above request, it is noted that your filing included data for "Period I" based on calendar year 1972 with your comment that such calendar year data are designed to facilitate comparison of that period with the calendar year 1974 test period and to enable more ready reference to the Company's FPC Form No. 1. Although such data will be helpful in reviewing your filing, the Regulations require the submission of

[7] Appendix B-2A hereto.

> costs for the most recent twelve consecutive months for which actual data are available. On page five of the order issued July 17, 1973, amending Section 35.13, the Commission noted that various companies indicated that if Period I were the most recent calendar year it would facilitate compilation of cost of service data but the Commission stated that this did not alter its belief that the most recent twelve months of actual experience was appropriate.[8]

In subsequent cases, other attempts by utility companies to gain Commission acquiesence in the position which it had rejected in Order 487, namely that utility could file Period I data on a calendar year basis, even if it were not the most recent actual data available, were rejected, unless there was a showing of special circumstances made warranting a waiver of the regulation.[9] For example, in *Southern California Edison Co.*,[10] the utility filed a rate increase on January 2, 1974 using calendar year 1972 as Period I, so that the Period I data were almost exactly a year old. The Commission on February 1, 1974, issued a deficiency letter in which it requested, among other things, an explanation of "what data are not available

[8] Appendix B-2a hereto.

[9] In several other cases occurring at the end of 1974, it is not as clear whether the Commission is waiving its regulation or inconsistently applying it, since the Commission does not discuss the regulation therein. Commonwealth Edison Co., Docket No. E-9002, October 29, 1974; Montaup Electric Co., Docket No. E-9046, December 18, 1974; Rockland Electric Co., Docket No. E-9001, September 27, 1974; and Central Vermont Public Service Corp., Docket No. E-9040, December 5, 1974. See 557 F.2d at 848 n. 10 and Appendix A-1 hereto. However, in the cases set forth in this statement which do discuss the regulation, it is clear that the Commission did not intend to deviate from requiring the most recent 12 months of actual data available and did not intend to permit calendar year filings that were not also the most recent data available unless waiver was granted for good cause shown.

[10] 50 F.P.C. 591 (1974), reh. denied, 51 F.P.C. 1406 (1974), and see Appendix B-2b hereto.

except on a calendar year basis and how the lack of such data prohibits the use of a more recent test period."[11] Southern California Edison Company responded on February 13, 1974, with a list of three items of data that under its accounting procedures were not available until year end.[12] The Company said, "Such items involve several millions of dollars and thus, while not affecting the overall results greately, cannot properly be considered de minimis". On March 1, 1974, the Commission found that the Company had cured the deficiency, and the rate was accepted for filing.[13]

In the summer of 1975, the Commission in *Public Service Company of New Hampshire*, Docket No. E-9290[14] reiterated its position that a filing based on the most recent calendar year for which the Company had data already compiled was not responsive to the Regulations which require twelve consecutive months for which data were available even if this meant development of a Period I test year actual cost of service which was not based on a calendar year:

> The original filing by PSCNH in this matter was tendered February 26, 1975, and rejected by letter dated March 5, 1975, by the Secretary of the Commission for the reason that the filing was predicated not upon the most recent twelve consecutive months for which data were available; but rather, on the most recent calendar year for which the Company had data compiled. Subsequently, on March 12, 1975, PSCNH resubmitted the filing of February 26, 1975, taking the position that the 1973 data were indeed the most recent available, in that the Company pro-

[11] Appendix B-2b hereto.

[12] Appendix B-2b hereto.

[13] 51 F.P.C. at 951 and 952.

[14] 5 F.P.S. 5-818.

cessed the cost of service data typically on the calendar year basis and would incur unreasonable delay if it had to develop a split test year cost of service. Additionally, the Company requested a waiver of Section 35.13(b)(4)(iii) of the Commission's Regulations.

The deficiency of the March 12, 1975, filing by PSCNH necessitating its rejection was our belief "that the 1973 test period is simply too stale and outdated on which to base rates for the future. To utilize 1973 data for designing future rates could well lead to results which are not representative of present or future conditions." (p. 3) Nor was good cause found to exist which would justify a waiver of our filing requirements being granted. The contention by PSCNH that it could not split its calendar year cost of service data because the requirements would create an unreasonable delay was found to be an "inadequate basis" for granting that waiver. Accordingly, the March 12, 1975, filing of PSCNH was rejected without prejudice to their right to file a proposed rate increase in conformance with the Commission's filing requirements. In addition, the Company's request for waiver of Section 35.13(b)(4)(iii) of the Regulations was denied.

On May 5, 1975, PSCNH filed with the Commission an Application for Rehearing of the April 11, 1975, order of the Commission. The Company maintains that it has in fact complied with Section 35.13(b)(4)(iii) of the Regulations. In justifying the submission of 1973 cost of service data, the Company reiterates the explanation regarding its calendar year basis of bookkeeping and claims undue delay would result were it required to file split test year cost of service results. The Company's contention that those data offered do reflect costs for the most recent twelve consecutive months for which data are available is a strained construction of that phrase. Regardless of whether they have been converted into cost of service form, the more recent 1974 data are available. It has not been satisfactorily demonstrated that the "undue delay" incurred in requiring the preparation of cost of service figures based on more recent data cannot be overcome with some applied effort.

The "staleness" of the data used in the computation of PSCNH cost of service remains its flaw. The essential noncompliance with the timeliness requirement of the Regulations is not avoided by turning attention to the practical effects of using the newer data. To rely on the probability that 1974 cost of service results will show increased costs over the 1973 test period is a spurious response to the fact of its basic staleness. Moreover, since PSCNH has refused to file a cost of service more recent than one based upon a calendar year of 1973, we are unable to confirm the assertion that a 1974 test year would show increased costs.

> The Company asserts that the Commission's order will "make it impossible for the Company to keep to a reasonable schedule for increasing its rates in an orderly manner" (p. 2). However, had PSCNH complied with the filing regulation initially, the disruption in its planned rate increases could have been averted." [15]

It is against this backdrop of the contemporaneous interpretation and application of the regulation in question by the Commission that the Court must view the rate filing by Respondent which was rejected by the Commission and the subsequent action of the Court of Appeals which found that that rejection was an abuse of the Commission's discretion.

On August 27, 1975, Respondent submitted its "S-4" rate filing with the Commission. In its submittal which proposed a rate increase to its municipal wholesale for

[15] 5 F.P.S. 5-818.

resale customers of $3,186,092, Respondent included Period I cost of service data based on calendar year 1974 thus ending almost eight months before the filing date.

By notice of proposed rulemaking of September 3, 1975, the Commission proposed to simply incorporate its established administrative construction of Section 35.13(b)(4)(iii) to avoid the utility's utilization of "subjective judgment" [16] in avoiding the impact of the requirement for the most recent actual data. In fact, the Commission proposed to tighten the construction even more by going to a four-month staleness period for actual Period I data rather than the seven-month period it developed in its administrative construction.

> (iii) The statement of the Cost of Service should contain unadjusted system costs for the most recent twelve consecutive months for which actual data are available (Period I) including return, taxes, depreciation, and operating expenses, and an allocation of such costs to the service rendered; provided, however, that the last day of the 12 months of actual experience shall not be more than four months prior to the date of filing the proposed change in rates and charges.[17]

On September 10, 1975, the Commission in *Interstate Power Company*, Appendix B-2c rejected a filing with Period I data that were seven and one-half months old, noting that if it accepted and suspended the filing for the allowable five month period, the subsequent rates would become effective over a full year after the end of Period I. The Commission observed that this year time lag was

[16] Amendment to Section 35.13 of the Commission's Regulations under the Federal Power Act, Docket No. RM76-6, issued September 3, 1975, 40 Federal Register 42029.

[17] By Order No. 545 issued on January 20, 1976, 54 F.P.C. —— the Commission amended its regulations to provide for a separation of no more than seven months between the end of Period I and the date of filing.

not "an appropriate basis upon which to establish rates for the present or future."

By letter order of September 24, 1975,[18] the Commission rejected Respondent's rate filing as deficient under Section 35.13(b)(4)(iii) of the Commission's Regulations:

> You provided Period I test data for the period ending December 31, 1974. Under Section 35.13(b)(4)(iii) of the Commission's Regulations, Period I data is required for the most recent twelve consecutive months for which actual data is available. Our review of your filing indicates that because the Period I test data which you provided is out of date, we cannot properly evaluate the propriety of your proposed rate increase. Therefore, please submit actual data for the period ending no earlier than four months prior to the date of filing of the proposed increase. We note that this action is consistent with our Order Rejecting Proposed Rate Increase and Denying Waiver in *Interstate Power Company*, Docket No. ER76-70, issued September 10, 1975, our letter order in *Ohio Power Company*, Docket No. ER76-83, issued September 19, 1975, and our Notice of Proposed Rulemaking, Docket No. RM 76-6, issued September 3, 1975.

The Commission amended its letter Order on November 11, 1975 [19] to assure Edison that it could rely on the previously-established seven-month standard being then applied to all filings. The Commission has subsequently applied the seven-month test uniformly across the board:

> In light of, and consistent with, the Commission's recent order in Montaup Electric Company, —— FPC —— issued November 3, 1975, in Docket No. ER76-45, the deficiency letter dated September 24,

[18] Appendix B-1a hereto.

[19] Appendix B-1b hereto.

1975, is hereby amended to provide that any new tender of filing must utilize Period I and Period II data such that Period I ends no earlier than 7 months prior to the date of such new tender of filing.[20]

In its Order Denying Rehearing of November 14, 1974,[21] the Commission noted that:

> During the year 1975, we have accepted electric rate filings utilizing Period I data for the twelve months ended December 31, 1974, as meeting the filing requirement of Section 35.13(b)(4)(iii) of the Regulations that such data be ". . . for the most recent twelve consecutive months for which actual data are available . . ." However, we realized in so doing that at some point in time data for the twelve months ending December, 1974, would eventually become stale and thus outside any reasonable interpretation of Section 35.13(b)(4)(iii) of the Regulations which requires submission of the most recently available data. In *Interstate* we were dealing with data that were too stale to be the "most recent available" and therefore rejected Interstate's filing for failure to comply with Section 35.13(b)(4)(iii) of the Regulations. Since that action, we have consistently refused to accept rate filings containing Period I data which were more than seven months old.
>
> In the instant proceeding, the Commission by letter dated September 24, 1975, assessed as deficient Edison's filing, which was tendered on August 27, 1975, because the Period I data were nearly 8 months old. We therefore determined that the data were too stale to be the "most recently available," as required by Section 35.13(b)(4)(iii) of the Regulations and told Edison that a filing date would not be assigned to its submittal until Edison submitted data

[20] *Id.*

[21] Appendix B-1c.

> revising Period I and Period II such that Period I ended no earlier than four months prior to the date of filing. We find the action taken with respect to Edison's tender of filing to be consistent with the action taken with respect to *Interstate* as well as other similar filings. However, consistent with our findings in the preceding paragraph, we have subsequently modified our September 24, 1975, letter order to provide that the revised data for Period I and Period II be such that Period I end no earlier than 7 months prior to the data of any new tender of filing, since, as we have noted above, data of a filing will not be construed as the most recently available, as required by Section 35.13(b)(4)(iii) of the Regulations. In light of the above, we shall deny Edison's application for rehearing of our September 24, 1975, letter order." (Footnotes omitted).

Subsequently, Respondent appealed to the Court of Appeals and Petitioners were made parties through the intervention process. On January 23, 1976, Respondent tendered for filing with the Commission below revised cost data and supporting testimony in this docket. That filing was noticed by the Commission on January 29, 1976, and protests and petitions to intervene were filed. By Order dated February 20, 1976, the Commission suspended Respondent's revised filing for five months until July 24, 1976. In the framework of the Court of Appeals' proceeding then the issue is the appropriate status of Respondent's rate filing between the period 27 February to 24 July 1976.

The Court of Appeals ignored the contemporaneous interpretations of Order 487 by the Commission applying a seven-month standard and instead focused upon RM76-6[22] and the *Interstate Power Company*[23] proceedings as being

[22] 40 Federal Register 42029.

[23] Appendix B-2c hereto.

the first notice to Respondent that the standard was five or seven months. The Court of Appeals then held that since Respondent had not received notice of the proper time period for Period I data prior to its August 25, 1975 filing, the Commission had acted arbitrarily and abused its discretion in rejecting Respondent's filing. The Court of Appeals then stated the remedy for the Commission's error, namely that the S-4 rate filing become effective on February 27, 1976.

REASONS FOR GRANTING THE WRIT

1. This Court in *Udall* v. *Tallman*, 380 U.S. 1 (1965) admonished courts of review not to substitute their preferred interpretation of a regulation for that of an administrative agency but rather to accept the interpretation of the agency, if reasonable. 380 U.S. at 4. This Court reminded reviewing courts that an administrative construction of its own regulation is entitled to great deference:

> Since this involves an interpretation of an administrative regulation a court must necessarily look to the administrative construction of the regulation if the meaning of the words used is in doubt . . . (T)he ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation." Bowles v. Seminole Rock Co., 325 US 410, 413-414, 89 L ed 1700, 1702, 65 S Ct 1215.

380 U.S. at 16-17.

The Court of Appeals ignores this precept. The Court of Appeals disregards the contemporaneous construction of Section 35.13(b)(4)(iii) by the Commission. The Court of Appeals substitutes its own interpretation of the regulation touted by Respondent for the reasonably based and hence controlling, construction of the Commission.

The factual assumption which underlies the Court of Appeals' Opinion is that "On 10 September 1975 in *Interstate Power Co., supra*, Respondent for the first time rejected calendar year data for Period I as being stale." 557 F.2d at 848, and Appendix A-1 hereto. This seminal assumption which serves as the factual predicate to the Court's decision blatantly ignores the clear language and contemporaneous construction of the regulation by the Commission set forth in the Statement of the Case, *supra* at pp. 4-11 and brought before the Court in the briefs of the Commission and Intervenor Towns, Petitioners herein. The Court of Appeals chose to accept only the characterization advanced by Respondent here:

> The Commission's application of the regulations promulgated in Order No. 487 conclusively demonstrates that no four month test or seven month test is implicit in them or was read into them before Interstate." [24]

The Court of Appeals has thus committed the same error which caused this Court to reverse its decision in *Udall* v. *Tallman*, 380 U.S. 1, 18 (1965). In that case, this Court rejected the seminal factual assumption underlying the Court of Appeals:

> The failure of the court below to attach proper significance to the administrative practice seems to be attributable to the fact that it was misinformed concerning that practice. (p. 40).

380 U.S. 18 n. 13

This Court then proceeded to inquire into the Secretary of the Interior's interpretation of his regulation as reasonable, held that the language of the orders bore out his construction, and reversed the Court of Appeals. 380

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[24] Respondent's Initial Brief to the Court of Appeals at page 15 attached hereto as Appendix C.

U.S. at 18. The same result should apply in this proceeding.

The avowed purpose of the Commission in 1973 in amending Section 35.13 of the Regulations under the Federal Power Act to require the filing of unadjusted cost of service data for the most recent twelve consecutive months of actual experience (Period I) plus estimated data for a future period (Period II) was to "enable the Commission to consider data more suitable [than historical test years] for the determination of rates for future use. . . ." F.P.C. Order No. 487, 50 F.P.C. 125, 126 (1973). Indeed, in Order 487 approving the new regulation, the Commission concluded that the effect of the Period I and Period II data would be to establish a test period representing costs six months prior to and six months after a rate change would become effective. *Id.* at 127. According to the Commission, such data was necessary to enable it

> . . . to establish rates more in line with costs and lend itself to greater rate stability thus mitigating the frequency of rate increase filings. More importantly however, we believe it is essential to the public interest that rates reflect the present costs of providing service in order that we may insure a continuing and adequate supply of electric power energy to meet the public's ever increasing power requirements.

50 F.P.C. at 127

Because the end result desired (i.e., a test period that would bracket the effective date of the proposed rate) was closely interrelated with the period data to be furnished, the Commission emphasized in its order the importance of submitting the most recent actual data for Period I.

> Some companies recommended that Period I should be not more than four to six months prior to the filing date of a rate case. *Others indicate that it would facilitate the compilation of cost of service data if Period I were the most recent calendar year* and Period II were the first full calendar year after the effectiveness of the new rates. *Our review of the comments which suggest changes to the proposed Period I does not alter our belief that Period I should be the most recent twelve months of actual experience. With Period I so described, we will have the most recent available data with which to analyze the normality or abnormality of estimated costs vis-a-vis historical experience.* (Emphasis added.)

50 F.P.C. at 128.

The requirement imposed by the FPC in 1973 for submission of the most-recent actual data available for Period I was eminently logical and in its view a necessity to properly evaluate the new future test year (Period II) based on estimated data. In promulgating the change to Section 35.13, the Commission effected a departure from its traditional reliance on an historical test year which was approved in *American Public Power Ass'n* v. *FPC*, 522 F.2d 142 (D.C. Cir. 1975). The Court of Appeals in its affirmance found that the Commission was not bound to any particular ratemaking formula, but is "free, within the broad ambit of the statutory rubric, to cope with events." 552 F.2d at 169.

Thus the Commission was held empowered to promulgate rules to "cope with events" and is also empowered to interpret them so as not to frustrate the rule's underlying purpose. The Court of Appeals, however, frustrates the rules underlying purpose.

The argument Respondent made to the Court of Appeals that the most recent *calendar year* should be the

Period I—was presented to the Commission in its consideration of the "future test year" rulemaking, and rejected. The Commission refused to abandon the key to the asserted fairness of the "future test year"—the requirement that Period I be the *latest* available twelve month data—in favor of the easier to account for most recent *calendar year*. Consequently, if it is intended to assert that utility companies understood that they could file Period I data on a calendar year basis even if it were not the most recent available data, that understanding would certainly not be based on the language of the regulation nor on the order adopting it.

Contemporaneous with the promulgation of the revised Section 35.13(b)(4)(iii) the Commission rejected a calendar-year filing by *Minnesota Power & Light Co.*[25] as too stale. The Commission, as it had stated in Order No. 487, acknowledged that waiver of the regulations would be granted for good cause shown, a step which does not "amend" its regulations. See *Southern California Edison Company.*[26] The Commission clearly stated that the convenience to a utility of filing on a calendar year basis could not thwart its regulatory need for the most recent data in a filing. *See Public Service Company of New Hampshire.*[27]

The error of the Court of Appeals' opinion—its inconsistency with the mandate of this Court in *Udall* v. *Tallman* regarding deference to administrative construction of its regulations—is evident and inquiry into reasons for granting certiorari need proceed no further. However, since the Court of Appeals in not following the Com-

[25] See discussion at pp. 6-8, *supra*, and Appendix B-2a hereto.

[26] See discussion at pp. 8-9, *supra*, and Appendix B-2b hereto.

[27] See discussion at pp. 9-11, *supra*, and 5 F.P.S. 5-818.

mission's construction of its regulation rests its decision on failure of notice to Respondent of a change in the administrative standard for rejecting filings for stale data, some mention must be made that even under that criteria, the Court of Appeals' conclusion is erroneous.

The examples of the Commission's interpretation and application of its regulations set forth above and at pp. 6-12 in the Statement of the Case involve rejection or express waiver of regulations. The Commission toward the end of 1974 permitted several filings exceeding the seven month stale data limit in which it is not clear whether the basis for the Commission action was considered waiver of the Commission's regulations. See p. 8 *supra.* The Commission did not however, in those orders, discuss the regulations, purport to amend its regulations, nor announce any new policy of interpretation of those regulations and it reiterated its seven-month criteria in 1975 in *Public Service Company of New Hampshire.*[28] The real question, then, is not whether the Commission changed its regulations, as fairly understood, without notice, thus trapping Respondent, as the Court of Appeals suggests; but *whether the failure to consistently enforce a regulation designed to protect wholesale customers constitutes a waiver of that regulation to the detriment of the consumers.*

Did the Commission waive its right to enforce its regulation assuming an unexplained failure to enforce it during a brief period in 1974? Preliminarily, it should be noted that this is not a case, like *Golden Holiday Tours* v. *CAB*, 531 F.2d 624 (1976), relied upon by the Court of Appeals, where the only impact of an agency decision was the imposition of additional costs to the petitioner which could be recovered if the agency were in error. In this case the Commission, as it was created to

[28] 5 F.P.S. 5-818.

do, issued an order protecting the wholesale customers of Respondent against a very substantial rate increase filed not in accordance with its Regulations which provided a modicum of protection for the consumers. The wholesale customers, four Massachusetts towns with publicly-owned electric distribution systems, relied upon the FPC order and did not raise their retail electric rates to cover the cost of the wholesale power rate filing which the Commission had rejected. Consequently, as discussed at part 2, *infra*, if the Court of Appeals' order stands, the wholesale municipal customers must pay Respondent $1.8 million which they never collected. The Draconian result which is suggested by the court penalizes, not the Commission, but Petitioners and the other municipal wholesale customer which were certainly not at fault in this matter and relied in good faith upon the Commission's regulation and action.

As noted above, this case, unlike *Golden Holiday*, *supra*, involves an agency action which has an immediate substantial dollar impact on Petitioners not the agency. But even in cases where the monetary issue is solely between the petitioner and the government, and where the failure to enforce regulations takes the form of a positive representation, it has been held to be clear that no waiver or estoppel occurs. *Dixon* v. *United States*, 381 U.S. 68, 70-75 (1965); *Federal Crop Insurance Corp.* v. *Merrill*, 332 U.S. 380, 383-386 (1947). *See also*, *United States* v. *Zenith-Godley Co.*, 180 F. Supp. 611, 616 (S.D.N.Y. 1960), *affirmed*, 295 F.2d 634 (2d Cir. 1961); *Government of the Virgin Islands* v. *Gordon*, 244 F.2d 818, 820-821 (3d Cir. 1975); *United States* v. *San Francisco*, 310 U.S. 16, 31-32 (1940); *Utah Power & Light Co.* v. *United States*, 243 U.S. 389 (1917). These cases make it clear, we believe, that the government does not lose its right to enforce a regulation by failure so to do for a period, regardless of reliance, even if justified, which

we cannot believe it was here. Indeed, the proper analogy would be to an error-prone district court judge who consistently rules incorrectly that an act of Congress does not apply to a particular recurring factual situation. It could scarcely be contended that others than parties to the law suit in which the erroneous rulings were made lost their rights thereby, or that the government, if a defendant, were estopped to assert its position in other courts.

To the extent that there is a reliance interest here by Respondent on the Commission having failed to enforce its regulations against others similarly situated, in *the prior year* (no one contends that the Commission did not give all filings utilities like treatment in 1973 and 1975), it is scarcely the sort of interest which can overcome the reliance of Petitioners (and the other wholesale customer) on having the Commission enforce its regulation. A like argument was made by the natural gas producers for years, but uniformly rejected. *Atlantic Refining Co.* v. *Public Service Commission of New York*, 360 U.S. 378, 388 (1959); *United Gas Improvement Co.* v. *Callery Properties*, 382 U.S. 223, 229-230 (1965); *FPC* v. *Sunray DX Oil Co.*, 390 U.S. 9, 40-47 (1968).

Obviously, in the analogous cases under the Natural Gas Act, the FPC has been held incapable of legally creating a reliance interest on the part of natural gas companies to the detriment of consumers. This is quite consistent with what we believe to be the governing law in this area, *Dixon*, *supra*, *Merrill*, *supra*, at 47, in language that could easily be applicable here, "although it is regrettable that the road which led to these . . . requirements could not have been straighter, we hold that the Commission did not exceed its authority". (footnote omitted).

2. The remedy permitted Respondent by the Court of Appeals [29] and agreed to by the Commission [30]—recoupment from its municipal customers of the revenues which it would have received from them had the Commission put the S-4 rate into effect five months earlier—, is at serious variance with the Federal Power Act as interpreted by this Court.

The policy of the Federal Power Act [31] against retroactive recoupment, grounded in the protection of otherwise unprotected consumers, was clearly recognized by this Court in *F.P.C.* v. *Tennessee Gas Transmission Company*, 371 U.S. 145 (1962).[32]

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[29] 557 F.2d at 849 and Appendix A-1 hereto.

[30] By Order of September 15, 1977 the Commission accepted for filing Respondent's revised S-4 rate schedule which embodied procedures for the collection of additional revenues consisting of the difference between its suspended S-4 rate and its S-3 rate for the period from February 27, 1976 through July 23, 1976 with 9 percent interest, amounting to over $1.8 million. The Company has sent bills to the Towns.

[31] See, e.g., F.P.C. v. Hope Natural Gas Co., 320 U.S. 591, 610-612 (1944), Atlantic Refining Co. v. Public Service Commission of N.Y., 360 U.S. 378, 388 (1959), Sunray Mid-Continent Oil Co. v. FPC, 364 U.S. 137, 149 (1960).

[32] As early as 1935 in Atlantic Coast Line Railroad Co. v. State of Florida, 295 U.S. 301, 314, the Supreme Court expressly rejected a shipper's suggestion that where a rate order was procedurally defective, the carriers should restore the excess over the last lawfully established rate, and thus "pay the price of the blunders of the commerce board." Under this rationale, the Towns should not be forced to pay over what they have never collected.

From another perspective, several recent cases have addressed the issue of whether a Commission, upon remand, should authorize a company to recoup revenues lost due to an erroneous Commission decision and have denied relief to the out-of-pocket utility.

In Bebchich v. WMATC, 485 F.2d 858, 864 (D.C. Cir. 1973), the Court expressly held that:

> ". . . the risk of loss from stay of a rate order must be borne by the utility, even if the stay was wrong."

[Footnote continued on page 25]

In that proceeding, Tennessee filed with the Commission increased rates predicated upon a cost of service which included a claim to a 7% rate of return. The Commission suspended for five months and for early determination severed the issue of rate of return from the rest of the issues. The Commission found the rate of return excessive and ordered interim refunds. Tennessee contended that this was improper. It was the position of that Company that requiring interim refunds based upon a lower rate of return than the one filed for while the issues of zone allocation proceeded raised the spectre of the Company never achieving the return authorized by the Commission. The Company posited that if the Commission decided the zone allocation issue in a way that would lower the rates filed for one zone and raise them for others,—the Company would have to refund to the latter but could never recoup from the former. The Supreme Court rejected the Company's position on a guaranteed return but agreed with it on recoupment:

> (The) policy of the Act clearly indicates that a natural gas company initiating an increase in rates under § 4(d) assumes that the hazards involved in that procedure. It bears the burden of establishing its rate schedule as being 'just and reasonable.' In addition, *the company can never recoup the income lost when the five-month suspension power of the Commission is exercised under § 4(e).* The company is also required to refund any sums thereafter collected should it not sustain its burden of proving the reasonableness of an increased rate, and it may suffer further loss when the Commission upon a finding of excessiveness makes adjustments in the rate detail

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[32] [Continued]

Similarly in Democratic Central Committee v. WMATC, 436 F. 233, 236 (D.C. Cir. 1970) the same Court held it to be settled that losses which occur in the past, even though they result in an improvidently awarded stay, may not be recovered by fares charged in the future.

of the company's filing. *In this latter respect a rate for one class or zone of customers may be found by the commission to be too low, but the company cannot recoup its losses by making retroactive the higher rate subsequently allowed; on the other hand, when another class or zone of customers is found to be subjected to excessive rates and a lower rate is ordered, the company must make refunds to them. The company's losses in the first instance do not justify its illegal gain in the latter.* Such situations are entirely consistent with the policy of the Act and, we are told, occur with frequence. *The company having initially filed the rates and either collected an illegal return or failed to collect a sufficient one must, under the theory of the Act, shoulder the hazards incident to its action including not only the refund of any illegal gain but also its losses where its filed rate is found to be inadequate.* (371 U.S. at 152-153, emphasis added.)

So too with respect to the relief sought by Respondent herein in support of its claim for recoupment against its wholesale customers. Respondent bears the risk that the Commission will unjustifiably suspend or reject its rate filing. This is not a risk that its customers should be required to furnish insurance against. The customer is the protected entity, it should have to insure against neither the errors of the Company nor the errors of the Commission. Towns have every legal right to rely on the legitimacy and reasonableness of an apparently valid Commission order, only later found to be technically in error in application as to a valid and properly enforceable Commission Regulation. The fact that the Company contested the ruling does not dilute Towns' right of reliance. As the Supreme Court said in *FPC* v. *Hope Natural Gas Company*, 320 U.S. 591, 602 (1944) ". . . the Commission's order does not become suspect by reason of the fact that it is challenged. It is the product of expert judgment which carries a presumption of validity." The Petitioners, acting

in *bona fide* reliance on a final Commission order rejecting the rate, did not pass on the proposed increase to their customers. Therefore, retroactive application of an increase to Petitioners for the period in question should not be permitted. *National Ass'n of Independent Television Producers and Distributors* v. *FCC*, 502 F.2d 249, 153-255 (2d Cir. 1974); *City of Chicago* v. *FPC*, 28 U.S.App.D.C. 107, 385 F.2d 629, 637 (D.C. Cir. 1967); *Bel Oil Corp.* v. *FPC*, 255 F.2d 548, 553-554 (5th Cir. 1958).

CONCLUSION

The Court of Appeals ignored the plain language and contemporaneous constructions of Section 35.13 (b) (4) (iii) by the Commission; substituted its own interpretation of that regulation and held that the Commission had improperly rejected Respondent's rate filing. This result flies in the face of this Court's decision in *Udall* v. *Tallman* and requires the granting of this petition for certiorari. Further, the Court of Appeals' remedy for alleged improper rejection,—to put the Respondent in the position it would be in had the rate filing been accepted and made effective five months earlier,—is at variance with Court precedent in that it makes the consumer the insurer against errors of the Commission. It forces Petitioners to pay over to Respondent revenues they have never collected from their customers because the rate used as the revenue measure was not in effect during the time for which payment is sought. Petitioners submit that the purposeful ignorance of the facts and misapplication of this Court's precedent compel Court acceptance of this petition for certiorari.

Respectfully submitted,

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2600 Virginia Avenue, N.W.
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Attorneys for Petitioners the Town of Norwood, Concord and Wellesley, Massachusetts

APPENDICES

APPENDIX A

Appendix A-1

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

No. 75-2123, 76-1392

BOSTON EDISON COMPANY,
Petitioner,
v.
FEDERAL POWER COMMISSION,
Respondent,
TOWNS OF NORWOOD, CONCORD AND WELLESLEY, MASSACHUSETTS, MUNICIPAL LIGHT BOARD OF READING, MASSACHUSETTS,
Intervenors.

BOSTON EDISON COMPANY,
Petitioner,
v.
FEDERAL POWER COMMISSION,
Respondent,
THE TOWNS OF NORWOOD, CONCORD *et al.*, MUNICIPAL LIGHT BOARD OF READING, MASSACHUSETTS,
Intervenors.

Argued 14 Dec. 1976

Decided 17 May 1977

Rehearing and Rehearing En Banc
Denied 27 June 1977

Opinion for the Court filed by Circuit Judge WILKEY.

WILKEY, Circuit Judge:

This proceeding consolidates two petitions for review of respondent's orders [1] emanating from petitioner's S-4 [2] rate filing. The legal issue posed is whether after a wholesale electrical rate application has been filed, presenting cost data deemed current by then-existing regulations, the Commission by subsequent general regulation can declare the data stale and reject the application.[3]

I. PROCEDURAL BACKGROUND

On 27 August 1975 petitioner filed its S-4 rate schedule for a rate increase conforming to the regulations established by the FPC in 1973, Order No. 487,[4] by which utilities were required to supply cost-of-service data for two periods, Period I and Period II, as opposed to one twelve-month period formerly required. For Period I actual unadjusted system cost data was to be supplied covering "the most recent twelve consecutive months for which actual data are available." [5] For Period II estimated cost-of-service data was to be furnished for "any

[1] The orders under review in No. 75-2123 are dated 24 September 1975 and 14 November 1975; in No. 76-1392 they are dated 20 February 1976 and 12 April 1976.

[2] The S-4 rate is a wholesale electric power rate, the rate applicable to intervenors.

[3] Unfortunately, this opinion is replete was recitation of dates, order numbers, and calculations of periods of time. It must be realized that the argument over these rate filings revolves around precisely these matters.

[4] 50 F.P.C. 125 (1973), rehearing denied, 50 F.P.C. 736 (1973), 18 C.F.R. § 35.13(b)(4)(iii).

[5] *Ibid.*

twelve consecutive months beginning after the end of Period I but not later than the date the rates are proposed to be effective." [6] In compliance with Order No. 487, petitioner presented data on calendar year 1974 for Period I and estimated data on calendar year 1975 for Period II. The Period I data was thus *less than eight months old* when the rate was filed.

By letter dated 24 September 1975 the respondent FPC notified petitioner that its S-4 rate filing was deficient because the Period I data provided was *out-of-date*, and advised that data should be submitted for a period ending no earlier than *four months*, prior to the filing date. On 11 November 1975 the four-month period was changed by the FPC to no more than seven months prior to the new tender of filing. Then on 14 November 1975 the FPC issued an order denying rehearing to petitioner and reiterating that Period I data which is eight months old when filed is "too stale to be the most recently available as required by Section 35.13(b)(4)(iii). . . ."

In defense of its actions re petitioner's filings the FPC asserts that since issuance of an order on 10 September 1975 in *Interstate Power Co.*,[7] the FPC had not accepted filings containing Period I data which were more than seven months old. We accept this assertion as factually correct for the purpose of this decision; the critical feature, however, is that the asserted water-shed date of 10 September 1975 is *subsequent* to petitioner's rate filing on 27 August 1975, although prior to the FPC rejection of the rate filing on 24 September 1975. It may also be noted that the FPC letter of 24 September 1975 decreed a *four-month* freshness standard, not the seven months now asserted.

[6] *Ibid.*

[7] Docket No. ER-76-70.

The above filing and rejection became the subject of appeal No. 75-2123 in this court. No. 76-1392 arose out of petitioner's revised S-4 rate filing.

On 23 January 1976 petitioner filed a revised S-4 rate schedule containing Period I data which were less than four months old when filed, as petitioner had been specifically advised to do, requested an effective date of thirty days after submission, and further requested that if a suspension period was to be imposed, it be limited to four days so that it would end on 27 February 1976, which is the date on which the original rejected rate filing would have become effective if the FPC had accepted and suspended it for the maximum allowable period of five months.[8] FPC orders of 20 February and 12 April 1976 accepted the 23 January 1976 filing, provided for Commission consideration by hearing, but suspended the rate increase for five months until 24 July 1976.

The practical question ultimately to be answered in dollars and cents is thus what rate petitioner is entitled to charge its customers for the period 27 February to 24 July 1976.

II. DISCUSSION

The regulation promulgated by Order No. 487 in 1973 responded to a need by the Federal Power Commission for more current cost-of-service data in ratemaking proceedings in a period when inflationary forces were causing an upward spiraling of fuel and other costs. Order No. 487 contained the following:

> Upon further review of the make-up of Period II, we conclude that that period should be made more flexible by designating it as any twelve consecutive month period beginning after Period I but no later than the date on which the new rates become effective. This

[8] 16 U.S.C. § 824d(e).

> change will permit companies to file costs projected on a *calendar year basis* if they so desire.[9]

The FPC concedes that utility companies interpreted Order No. 487 to allow Period I cost-of-service data to be filed on a calendar year basis, following prevalent bookkeeping practices.

On 10 September 1975 in *Interstate Power Co., supra,* respondent for the first time rejected calendar year data for Period I as being stale. Fourteen days later petitioner's S-4 rate filing was rejected and subsequently the filings of other utility companies were accorded the same treatment.[10]

On 3 September 1975 the Commission issued a Notice of Proposed Rulemaking[11] to amend Section 35.13(b)(4)(iii), the regulation previously amended in 1973 by Order No. 487, from which the following is quoted:

> In its present form, the provision requiring a cost of service statement for twelve months of actual experience does not specify how current the actual data must be. Our experience indicates that the modifying phrase, "for the most recent twelve consecutive months for which actual data are available," is ambiguous and has given rise to varying constructions.

Recognition was made of the fact that companies which used a calendar year basis of bookkeeping had filed cost-of-service data on a calendar year basis and that this has

[9] 50 F.P.C. 125 at 128 (emphasis added).

[10] *Montaup Electric Company,* —— F.P.C. ——, 3 Nov. 1975, Docket No. ER76-46; *Consumers Power Company,* —— F.P.C. ——, 29 Oct. 1975, Docket ER76-45; *Western Power Division, Central Telephone and Utilities Corporation,* —— F.P.C. ——, 5 Nov. 1975, Docket No. ER76-92; *Toledo Edison Company,* —— F.P.C. ——, 31 Dec. 1975, Docket No. ER76-132.

[11] Docket RM76-6, 40 Fed.Reg. 42029.

resulted in less recent data than if the company had utilized a split-test-year cost of service. The notice further stated, "We believe the proposed change should develop a standard of uniformity in the filing requirements . . . and more accurately project future conditions." This notice of rulemaking was, like the order in *Interstate Power Co., supra, subsequent to* petitioner's rate filing but prior to the FPC rejection of those rates.

Order No. 545, issued 20 January 1976,[12] amended the regulations to provide that a period of no more than seven months separate the end of Period I and the date of tender for filing. Referring to the end of the period of actual cost data, Order No. 545 acknowledged, "The present regulations are unspecific as to this time interval."

Aside from the regulations' admitted lack of specificity, it is readily apparent that after the 1973 amendment calendar year cost-of-service data for Period I had been customarily received by the FPC in relation to rate increase filings. By 3 September 1975 the FPC realized stale data was frustrating the purpose of having the data filed, and so launched upon a Proposed Rulemaking proceeding to correct its own ineffective regulations.

So we come to the legal issue originally posed, which somewhat restated is, whether the Commission was acting within its authority in rejecting a rate filing already pending on 3 September 1975, which had been filed pursuant to then effective regulations. We think not.

A similar situation was presented in *Golden Holiday Tours* v. *Civil Aeronautic Board*,[13] in which the Board had rejected a tour prospectus amendment because of a recently adopted regulation that amendments be filed fifteen days before the effective date, following a long-stand-

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[12] —— F.P.C. ——.

[13] 174 U.S.App.D.C. 292, 531, F.2d 624 (1976).

ing flexible practice of permissible filing five days after the effective date. This court held the rejection an arbitrary act and an abuse of administrative discretion, inconsistent with the protection of the traveling public, following a continued pattern of relatively flexible administrative practice.

Petitioner's S-4 rate increase filing must be viewed in the posture of respondent's regulations on 27 August 1975. These regulations permitted cost-of-service data of the most recent *calendar* year for Period I. The applicable law is cogently stated in *Greater Boston Television Corporation* v. *Federal Communications Commission*,[14] "But an agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed. . . ."

The FPC acted arbitrarily and abused its discretion in applying a standard contrary to its existing regulations. Although an administrative agency is not bound to rigid adherence to its precedents, it is equally essential that when it decides to reverse its course, it must give notice that the standard is being changed, *Columbia Broadcasting System, Inc.* v. *Federal Communications Commission*,[15] and apply the changed standard only to those actions taken by parties after the new standard has been proclaimed as in effect. We do not pass on precisely what action was needed by the FPC here to make the new standard of seven (or four) months old data effective; we only say that the earliest notice of any change in the standard was subsequent to petitioner's filing, and therefore ineffective as to petitioner.

In applying the appropriate remedy on the authority of *Indiana & Michigan Electric Company* v. *Federal*

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[14] 143 U.S.App.D.C. 383, 394, 444 F.2d 841, 852 (1970), *cert. denied*, 403 U.S. 923, 91 S.Ct. 2229, 29 L.Ed.2d 701.

[15] 147 U.S.App.D.C. 175, 183, 454 F.2d 1018, 1026 (1971).

Power Commission,[16] we require that petitioner's S-4 rate filing become effective as of 27 February 1976, five months from the filing date of 27 August 1975.

CONCLUSION

The orders here in issue are vacated and the case remanded for action consistent with this opinion.

So Ordered.

[16] 163 U.S. App. D.C. 334, 341-46, 502 F.2d 336, 343-48 (1974) (Opinion on Rehearing).

Appendix A-2

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[Title Omitted]

[Filed June 27, 1977]

ORDER

Upon consideration of the petitions for rehearing filed by intervenors The Towns of Norwood, Concord and Wellesley, Massachusetts and Municipal Light Board of Reading, Massachusetts, it is

ORDERED by the Court that intervenors' aforesaid petitions for rehearing are denied.

Per Curiam

For the Court:

GEORGE A. FISHER
Clerk

Appendix A-3

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

[Title Omitted]

[Filed June 27, 1977]

ORDER

The suggestions for rehearing *en banc* filed by intervenors The Towns of Norwood, Concord and Wellesley, Massachusetts and Municipal Light Board of Reading, Massachusetts having been transmitted to the full Court, and no judge having requested a vote with respect thereto, it is

ORDERED by the Court, *en banc*, that intervenors' suggestions for rehearing *en banc* are denied.

Per Curiam

For the Court:

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

Appendix A-4

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

[Title Omitted]

[Filed July 28, 1977]

ORDER

Upon consideration of (1) intervenors' motion for stay of mandate and petitioner's opposition thereto; (2) petitioner's motion to require bond or other security and intervenors' opposition thereto; and (3) petitioner's motion for instructions in the mandate for the allowance of interest and the opposition thereto, it is by the Court

ORDERED:

(1) Intervenors' motion for stay of mandate is denied;

(2) Petitioner's motion to require bond or other security is denied; and

(3) Petitioner's motion for instructions in the mandate on allowance of interest is granted in that this matter is referred to the Federal Power Commission with instructions to determine the appropriate rate and amount of interest to be allowed.

Per Curiam

For the Court:

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

APPENDIX B

Appendix B-1a

FEDERAL POWER COMMISSION
Washington, D.C. 20426

In reply refer to:
PWR-RC
Docket No. ER76-90

[September 24, 1975]

CERTIFIED MAIL

Debevoise & Liberman
Attention: George F. Bruder, Esq.
700 Shoreham Building
806-15th Street, N.W.
Washington, D.C. 20005

Gentlemen:

By letter dated August 27, 1975, you submitted for filing on behalf of Boston Edison Company proposed changes in that company's rates for wholesale for resale electric service to the towns of Concord, Norwood, Reading and Wellesly. Your submittal is deficient with respect to certain requirements of Part 35 of the Commission's Regulations under the Federal Power Act.

You provided Period I test data for the period ending December 31, 1974. Under Section 35.13(b)(4)(iii) of the Commission's Regulations, Period I data is required for the most recent twelve consecutive months for which actual data is available. Our review of your filing indicates that because the Period I test data which you provided is out of date, we cannot properly evaluate the propriety of your proposed rate increase. Therefore,

please submit actual data for the period ending no earlier than four months prior to the date of filing of the proposed increase. We note that this action is consistent with our Order Rejecting Proposed Rate Increase and Denying Waiver in *Interstate Power Company*, Docket No. ER76-70, issued September 10, 1975, our letter order in *Ohio Power Company*, Docket No. ER76-83, issued September 19, 1975, and our Notice of Proposed Rulemaking, Docket No. RM76-6, issued September 3, 1975.

We additionally note that your proposed rates are based on data for Period II, ending December 31, 1975. Therefore, pursuant to Section 35.13(b)(4)(iii) of the Commission's Regulations, which requires that Period II begin after the conclusion of Period I, revised Period II data should also be submitted.

A filing date will not be assigned to your submittal pending receipt of the requested information.

By direction of the Commission.

/s/ Kenneth F. Plumb
Secretary

cc: Boston Edison Company
800 Boylston Street
Boston, Massachusetts 02199

Appendix B-1b

FEDERAL POWER COMMISSION
Washington, D.C. 20426

In Reply Refer To:
PWR-RC
Docket No. ER76-90

[November 11, 1975]

Debevoise & Liberman
Attention: George F. Bruder, Esq.
700 Shoreham Building
806 15th Street, N.W.
Washington, D.C. 20005

Gentlemen:

By letter dated September 24, 1975, we advised you that the test data submitted in support of your filing in the captioned docket on behalf of Boston Edison Company was out of date.

In light of, and consistent with, the Commission's recent orders in: *Montaup Electric Company* —— FPC —— issued November 3, 1975, in Docket No. ER76-46 and *Consumers Power Company* —— FPC —— issued October 30, 1975, in Docket No. ER76-45, the deficiency leter dated September 24, 1975, is hereby amended to provide that any new tender of filing must utilize Period I and Period II data such that Period I ends no earlier

than 7 months prior to the date of such new tender of filing.

Very truly yours,

/s/ Kenneth F. Plumb
Secretary

cc: Boston Edison Company
800 Boylston Street
Boston, Massachusetts 02199

Appendix B-1c

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: Richard L. Dunham, Chairman; William L. Springer, Don S. Smith, and John H. Holloman III.

Docket No. ER76-90

BOSTON EDISON COMPANY

ORDER DENYING REHEARING

(Issued November 14, 1975)

On August 27, 1975, Boston Edison Company (Edison) tendered for filing proposed rate schedule changes designed to increase revenues from sales to four total requirements customers by $3,186,092, based on the twelve months test period ending December 31, 1975. Edison proposed that the rate schedule changes be made effective on September 27, 1975.

Upon review of Edison's filing of August 27, 1975, we concluded that it was deficient with respect to certain requirements of the Commission's Regulations. Accordingly, the Commission Secretary, by letter dated September 24, 1975, informed Edison that its filing did not comply with Section 35.13(b)(4)(iii) of the Regulations in that Period I did not incorporate the most recent twelve consecutive months for which actual data are available. The letter order required Edison to submit data revising Period I and II such that Period I ended no earlier than four months prior to the date of filing. Edison was notified that a filing date would not be

assigned to its submittal pending receipt of the requested data.

On October 15, 1975, Edison filed an application for rehearing of the Commission's letter order of September 24, 1975. In its application, Edison argues that Edison's rate filing complied with all the requirements of the Federal Power Act and the Commission's regulations and that, therefore, the Commission was compelled by law to assign the proposed rate a filing date of August 27, 1975, and either permit the rate to become effective on the proposed effective date, September 27, 1975, or suspend the rate for a period not in excess of five months. The Commission's action, Edison contends, constituted the unlawful application of a rate regulation contrary to accumulated administrative experience under the regulation. Edison continues, that the Commission unlawfully retroactively applied a new policy to a rate prepared and filed on the basis of that regulation and the Commission's past consistent interpretation of that regulation.

Edison relies on the omission of a specific standard by the Commission for judging the currentness of Period I data in Order No. 487, issued July 17, 1973, which made effective the present Section 35.13(b)(4)(iii). There, the Commission established that Period I should be "the most recent twelve consecutive months for which actual data are available." Edison concludes that the failure to adopt even a six months' limitation cannot be reconciled with a finding here that data submitted nearly eight months after the close of Period I are too stale for proper evaluation. Edison also avers that Order No. 487 specifically eased the proposed timeliness requirements in order to permit those companies which so desired to file their projected data on a calendar year basis, as well as Period I data based on the preceding calendar year as long as the data for that period are the most recently available.

Furthermore, Edison contends that if the rulemaking proceeding in Docket No. RM76-6[1] has been deemed necessary by the Commission to substitute a staleness test for the most recently available data requirement, then that test cannot be said to be already embodied in the regulations. The notice, Edison adds, by its language, recognizes that Section 35.13(b)(4)(iii) "does not specify how current actual data must be." Finally, Edison argues the notice, issued a week after the S-4 rate was filed, is not of a rule, but of a proposed rule which conceivably could be changed as a result of the rulemaking process, in which case an eight month interval might not be judged inappropriate. Edison points to previous rate filings accepted by the Commission, which included Period I data at least eight months old when filed.

Edison also points to the Commission's practice with respect to rate filings reflecting the inclusion of the component construction work in progress made after the issuance of its Notice of Rulemaking in Docket No. RM75-13. In *Philadelphia Electric Co.*,[2] as opposed to the instant case Edison argues, the Commission directed the rate applicant to observe the status quo pending the outcome of a rulemaking proceeding. Edison contends that the Commission now is making immediate and retroactive application of its proposed requirement, rather than observing the status quo until the rulemaking is effected.

In its final contention, Edison marks the prejudice to itself as substantial. Edison states it prepared the S-4 rate filing in reliance upon the Commission's previous interpretation of Section 35.13(b)(4)(iii). The additional revenues it anticipated once S-4 was made effective, Edison declares cannot now be relied on, although the new generating unit investment on which the S-4 rate

[1] Notice of Proposed Rulemaking, issued September 3, 1975.

[2] Docket No. E-9388, order issued September 26, 1975.

increase is largely predicated has been in service since June.

Edison maintains the Commission should assign the S-4 rate a filing date of August 27, 1975, and permit it to become effective, if not immediately, then no later than the expiration of the five month statutory suspension period, February 27, 1976. Edison is willing, it states, to submit updated evidence and its attempting to develop a revised Period I for the twelve months ended September 30, 1975, and a Period II for calendar year 1976. Edison, however, objects to the denial of an effective date for the S-4 rate and adds it is not confident it can meet the time limitations currently ordered by the Commission.

During the year 1975, we have accepted electric rate filings utilizing Period I data for the twelve months ended December 31, 1974, as meeting the filing requirement of Section 35.13(b)(4)(iii) of the Regulations that such data be ". . . for the most recent twelve consecutive months for which actual data are available . . ." However, we realized in so doing that at some point in time data for the twelve months ended December 31, 1974, would eventually become stale and thus outside any reasonable interpretation of Section 35.13(b)(4)(iii) of the Regulations which requires submission on the most recently available data. In *Interstate*[3] we were dealing with data that were 7½ months old and made the determination that such data were too stale to be "the most recently available" and therefore rejected Interstate's filing for failure to comply with Section 35.13(b)(4)(iii) of the Regulations. Since that action, we have consistently refused to accept rate filings containing Period I data which were more than seven months old.

[3] *Interstate Power Company*, Docket No. ER76-70, order issued September 10, 1975.

In the instant proceeding, the Commission by letter dated September 24, 1975, assessed as deficient Edison's filing, which was tendered on August 27, 1975, because the Period I data were nearly 8 months old. We therefore determined that the data were too stale to be the "most recently available," as required by Section 35.13 (b) (4) (iii) of the Regulations and told Edison that a filing date would not be assigned to its submittal until Edison submitted data revising Period I and Period II such that Period I ended no earlier than four months prior to the date of filing. We find the action taken with respect to Edison's tender of filing to be consistent with the action taken with respect to *Interstate* as well as other similar filings.[4] However, consistent with our findings in the preceding paragraph, we have subsequently modified our September 24, 1975, letter order[5] to provide that the revised data for Period I and Period II be such that Period I end no earlier than 7 months prior to the date of any new tender of filing, since, as we have noted above, data for a Period I which ends *more than* 7 months prior to the date of a filing will not be construed as the most recently available, as required by Section 35.13(b) (4) (iii) of the Regulations. In light of the above, we shall deny Edison's application for rehearing of our September 24, 1975, letter order.

The Commission finds:

Good cause exists to deny Edison's application for rehearing, as hereinafter ordered.

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[4] *See Montaup Electric Company*, —— FPC ——, issued November 3, 1975, in Docket No. ER76-46; *Consumers Power Company*, —— FPC ——, issued October 29, 1975, in Docket No. ER76-45; and *Western Power Division, Central Telephone and Utilities Corporation*, —— FPC ——, issued November 5, 1975, in Docket No. ER76-92.

[5] By Secretary letter, dated November 11, 1975.

The Commission orders:

(A) Edison's application for rehearing is hereby denied.

(B) The Secretary shall cause prompt publication of this order in the Federal Register.

By the Commission.

[SEAL]

Kenneth F. Plumb,
Secretary.

APPENDIX B-2

Appendix B-2a

[MPL Logo]

MINNESOTA POWER & LIGHT COMPANY
30 West Superior Street, Duluth, Minnesota 55802
Phone (Area 219) 722-2641

November 16, 1973

George B. Spurbeck
Vice President—Marketing
Federal Power Commission
825 North Capitol Street
Washington, DC 20426

Attention: Mr. Kenneth F. Plumb, Secretary

Gentlemen:

In compliance with Part 35.13 of the Regulations under the Federal Power Act, Minnesota Power & Light Company submits for filing five copies of the following documents:

1. Proposed Rate Schedule Nos. 90, with Rider, and 91;
2. Comparative sales and revenues therefrom by months under both the existing and proposed rate schedules. This analysis is for a 36-month period beginning January, 1972 for each point of delivery indicating kilowatt demand, kilowatt hours, base revenue, fuel revenue and total revenues;
3. Statements "A" through "P" for the calendar years 1972 and 1974;

4. Exhibits and testimony of Minnesota Power & Light Company in support of Rate Schedule Nos. 90 and 91; and
5. Contract for service to Superior Water Light & Power Company (SWL&P).

In accordance with Part 36 of the Regulations, Minnesota Power & Light Company's check in the amount of $23,038.42, payable to the Treasurer of the United States is hereby submitted, based on the excess of charges under the proposed rates over the existing rates for the twelve-month period beginning January 15, 1973.

Copies of this letter, the proposed Rate Schedule Nos. 90 and 91, and the statement comparing the sales and revenues therefrom which pertain to the particular customer have been mailed to the persons shown on the attachment to this letter.

A comparison of the proposed Rate Schedule Nos. 90 and 91 with other rates of the Company for similar wholesale service is omitted since the Company offers at this time no other wholesale service of sufficiently similar character to be comparable.

No facilities will be installed or modified in order to supply the service to be furnished except as such facilities may be required for additional service at future times.

The proposed changes filed herewith increase the rates for wholesale electric service rendered by this Company to 18 municipalities, two rural electric cooperatives, and one privately-owned electric system (SWL&P). When effective, proposed Rate Schedule No. 91 will be applicable to the Company's rural electric cooperative customers. Proposed Rate Schedule No. 90 will be applicable to all other sales-for-resale customers. The Rider attached to Rate Schedule No. 90 is applicable to the Company's five partial requirements municipal customers. For the con-

venience of the Commission, an additional twenty-eight copies of proposed Rate Schedule No. 90, ten copies of proposed Rate Schedule No. 90 with Rider, and six copies of proposed Rate Schedule No. 91 have been included.

Pursuant to Section 35.13(a) of the Commission's Regulations, the Company proposes to place Rate Schedule Nos. 90 (and Rider) and 91 into effect on January 15, 1974, as to all its wholesale customers.

The Company's contracts with ten of its municipal customers, both of its rural electric cooperative customers, and the contract filed herewith for SWL&P, contain language specifically allowing the Company to unilaterally seek changes in the rates, terms, and conditions of those contracts. The Company is limited by contract to an increase of 15% over the present rate level until September 28, 1975, for service to Itasca-Mantrap Cooperative Electric Association; however, revenue comparisons and applicable exhibits have been prepared on the basis of the entire proposed rate increase to this customer.

As to the remaining contracts, the Company is entitled, under the terms of those contracts as accepted for filing by the Federal Power Commission, to increase its rates in accordance with changes in the "All Commodities" Index taken from "Wholesale Prices" compiled by the United States Department of Labor, based on the formula specified in those contracts. Full implementation of this clause would result in an increase of 86%, as of November 1973, over the present rates to those customers. The rates proposed herein will result in average increases of 50.2% to the Company's rural electric cooperative wholesale customers, 80.5% to its partial requirements municipal wholesale customers, 40.1% to its full requirements municipal wholesale customers, and 65.6% to SWL&P.

Under the present rates, Minnesota Power & Light Company expects to earn, during the test year 1974, a rate

of return from service to its rural electric cooperative customer of 2.97%, 0.45% from service to its partial requirements wholesale customers, 3.90% from service to its full requirements municipal wholesale customers, and 0.35% from service to Superior Water Light & Power Company. The proposed rates will enable the Company to have the opportunity to earn from this service a rate of return more nearly appropriate to that required to attract the necessary amounts of capital which must be available to the Company if it is to continue to provide adequate service to these and other customers.

The Company's use of calendar year 1972 as "Period I" of its submittal is designed to facilitate comparison of that period with the calendar year 1974 test period and to enable more ready reference to the Company's FPC Form No. 1. The Company believes that the use of two calendar years provides more accurate comparisons of the Company's costs and earnings than use of a period ending some time during the calendar year. However, if required by the Commission, the Company will prepare an updated cost of service presentation for Period I.

Due to limited facilities for reproduction of materials, the Company has been unable to complete the assembly and reproduction of work papers relating to Statements A through O for the 1974 test period, as required by Section 35.13(b)(4)(iii) of the Regulations. Therefore, the required work papers will be transmitted to the Commission as soon after the filing attached hereto as possible.

The contract, dated November 1, 1974, for service to Superior Water Light & Power Company, transmitted herewith, is designed to supersede the contract and supplements currently on file with the Commission as Rate Schedule FPC No. 7, as amended.

A form of notice suitable for publication in the Federal Register is attached here, in accordance with the require-

ments of Section 35.8(a) of the Commission's Regulations. It is requested that copies of all notices and correspondence relating to this filing be sent to:

Kenneth A. Johnson
Minnesota Power & Light Company
30 West Superior Street
Duluth, Minnesota 55802

Harry A. Poth, Jr.
Reid & Priest
40 Wall Street
New York, New York 10005

Richard M. Merriman
Robert T. Hall, III
Reid & Priest
1701 K Street, NW
Washington, DC 20006

Sincerely

/s/ George B. Spurbeck
GEORGE B. SPURBECK

GBS:LK

FEDERAL POWER COMMISSION
Washington, D.C. 20426

In Reply Refer To:
PWR-RC
Docket No. E-8494

[December 6, 1973]

CERTIFIED MAIL

Minnesota Power & Light Company
Attention: Mr. George G. Spurbeck
Vice President, Marketing
30 West Superior Street
Duluth, Minnesota 55602

Gentlemen:

By letters dated November 16, 1973, you transmitted for filing a proposed increase in rates for wholesale electric service to 18 municipalities, two rural electric cooperatives and one privately-owned electric system. Your filing is deficient with respect to certain requirements of the Commission's Regulations under the Federal Power Act.

Pursuant to Section 35.13(b)(4)(ii) of the Regulations, please submit the following: (1) a full explanation of the bases of each of the estimated figures for "Period II," (2) the unadjusted system costs for the most recent twelve consecutive months for which actual data are available, (3) the work papers related to statements A through O.

Pending receipt of the above information a filing date will not be assigned to your submittal.

As further clarification of the above requested, it is noted that your filing included data for "Period I" based on calendar year 1972 with your comment that such calendar year data are designed to facilitate comparison of that period with the calendar year 1974 test period and to

enable more ready reference to the Company's FPC Form No. 1. Although such data will be helpful in reviewing your filing, the Regulations require the submission of costs for the most recent twelve consecutive months for which actual data are available. On page five of the order issued July 17, 1973, amending Section 35.13, the Commission noted that various companies indicated that if Period I were the most recent calendar year it would facilitate compilation of cost of service data but the Commission stated that this did not alter its belief that the most recent twelve months of actual experience was appropriate.

Your letter proposes a January 15, 1974, effective date. As indicated above, a filing date will not be assigned pending receipt of the required information, and the earliest effective date consistent with Section 35.13(b)(4)(i) of the Regulations is 60 days after the filing of the required cost of services data is completed.

Very truly yours,

Secretary

cc: Minnesota Power & Light Company
Attention: Mr. Kenneth A. Johnson
30 West Superior Street
Duluth, Minnesota 55602

Reid & Priest
Attention: Mr. Harry A. Poth, Jr.
40 Wall Street
New York, New York 10005

Reid & Priest
Attention: Messrs. Robert T. Hall, III
Richard M. Merriman
1701 K Street, N.W.
Washington, D.C. 20006

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: John N. Nassikas, Chairman; Rush Moody, Jr., William L. Springer, and Don S. Smith.

Docket No. E-8494

ORDER ACCEPTING FOR FILING AND SUSPENDING PROPOSED RATE INCREASE, PERMITTING INTERVENTION AND ESTABLISHING PROCEDURES

(Issued February 15, 1974)

On November 16, 1973, Minnesota Power and Light Company (MP&L) tendered for filing proposed changes in its rates and charges to twenty-one wholesale customers.[1] The proposed changes would increase annual revenues from jurisdictional sales by $3,607,683 based on the twelve-month period ending January 15, 1974. MP&L also tendered a contract for wholesale service to Superior Water Light and Power Company (SWL&P), superseding the present MP&L Rate Schedule FPC No. 7. MP&L requested an effective date of January 15, 1974 for its filings.

By letter dated December 6, 1973, the Secretary of the Commission informed MP&L that its initial filing was deficient with respect to Section 35.13(b)(4)(iii) of the Commission's Regulations and that no filing date could be assigned until the necessary material was supplied. The data in completion of the filing was submitted by MP&L on January 18, 1974. At the same time, MP&L requested waiver of the notice requirements of the Com-

[1] See Appendix A.

mission's Regulations, so that November 16, 1974, the date of the original tender might be assigned as the filing date.

In support of the proposed rate increase MP&L states the proposed rates are designed and necessary to improve the rate of return earned from its wholesale customers. MP&L also states that its contract with the Itasca-Mantrap Electric Co-operative limits any rate increase to 15 percent of the existing rate. Therefore, as to this customer MP&L does not propose to effectuate the entire rate increase, but only that amount equivalent to a 15 percent increase.

Notice of the initial tender was issued on November 30, 1973, providing for all comments and petitions to intervene to be filed on or before December 20, 1973.

The Village of Proctor filed a protest to the proposed rates on December 19, 1973. The Public Service Commission of Wisconsin filed a Notice of Intervention. On December 21, 1973, the Village of Aitkin, *et al.*,[2] (Petitioners) filed an untimely protest and petition to intervene.

Petitioners claim the filing should be rejected since, as evidenced by the Secretary's letter of December 6, 1973, it does not conform to the Commission's Regulations. In the alternative, Petitioners request suspension of the rate increase for the full five month term because of the size of the increase and the possibility of restrictive clauses in the proposed terms and conditions of service.

As indicated above, MP&L has cured the deficiency in its filing and therefore grounds for its rejection no longer exist. Our review of MP&L's filing and the issues raised therein indicates that the proposed changes have not been shown to be just and reasonable and may be unjust,

[2] See Appendix B.

unreasonable, unduly discriminatory, preferential or otherwise unlawful. Accordingly, we shall suspend the proposed changes for the full statutory period and establish hearing procedures to determine the justness and reasonableness of MP&L's filing.

As to MP&L's request for waiver of the notice requirements of the Commission's regulations, we believe good cause exists to assign January 18, 1974, the date MP&L cured the deficiency in its original tender, as the filing date for MP&L's proposed changes.

The Commission finds:

(1) The proposed changes in rates and charges, tendered by MP&L on November 16, 1973, should be accepted for filing as of January 18, 1974, as hereinafter ordered.

(2) The proposed change in rates and charges may be unjust, unreasonable, unduly discriminatory, preferential, or otherwise unlawful under Section 205 of the Federal Power Act and should be suspended for the full statutory term.

(3) Good cause exists to permit the intervention of the above-named intervenors.

(4) Good cause does not exist to grant waiver of Section 35.13 of the Commission's Regulations.

(5) The motion to reject the filing should be denied for the reasons stated above.

The Commission orders:

(A) Pending a hearing and a decision thereon, MP&L's proposed changes in its rates and charges, tendered on November 16, 1974, are accepted for filing as of January 18, 1974, and suspended for the full statutory term, the use thereof deferred until July 18, 1974, or until such

time as they are made effective in the manner provided in the Federal Power Act.

(B) Pursuant to authority of the Federal Power Act, particularly Sections 205 and 206 of the Commission's Rules and Regulations (18 CFR, Chapter I), a prehearing conference shall be held pursuant to Section 1.18 of the Commission's Rules of Practice and Procedure on July 9, 1974, at 10:00 A.M., EST, in a hearing room of the Federal Power Commission, 825 North Capitol Street, N.E., Washington, D.C. 20426. A hearing for purposes of cross-examination concerning the lawfulness and reasonableness of the rates and charges in company's FPC Rate Schedule, as proposed to be amended herein shall be held commencing on July 16, 1974.

(C) On or before May 31, 1974, the Commission Staff shall serve its prepared testimony and exhibits. Any intervenor evidence will be filed on or before June 14, 1974. Any rebuttal evidence by company shall be served on or before June 25, 1974.

(D) A Presiding Administrative Law Judge to be designated by the Chief Administrative Law Judge for that purpose (See Delegation of Authority, 18 CFR 3.5(d), shall preside at the hearing in this proceeding, shall prescribe relevant procedural matters not herein provided, and shall control this proceeding in accordance with the policies expressed in Section 2.59 of the Commission's Rules of Practice and Procedure.

(E) The parties designated above and in Appendix B are hereby permitted to intervene in this proceeding, subject to the Rules and Regulations of the Commission: *Provided, however*, that the participation of such intervenors shall be limited to matters affecting the rights and interests specifically set forth in the respective petitions to intervene; and *Provided, further*, that the admission of such intervenors shall not be construed as recognition

that they or any of them might be aggrieved because of any order or orders issued by the Commission in this proceeding.

(F) MP&L's motion for waiver of the notice requirements of Section 35.13 of the Commission's Regulations is denied.

(G) Petitioner's motion to reject the filing is denied.

(H) The Secretary shall cause prompt publication of this order in the Federal Register.

By the Commission.

[SEAL]

Kenneth F. Plumb,
Secretary,

Appendix B-2b

PRW-RC
Docket No. E-8570

[February 1, 1974]

CERTIFIED MAIL

Southern California Edison Company
Attention: Mr. W. M. Marriott
Manager of Revenue Requirements
P. O. Box 800
2244 Walnut Grove Avenue
Rosemead, California 91770

Gentlemen:

By letter dated December 31, 1973, you submitted for filing a proposal providing for an increase in the base rates for resale service, an extension of the R-2 resale rate schedule to both partial and full requirements service, and the addition of a fuel adjustment clause to both the R-1 and R-2 rate schedules. This is to advise you that your submittal is deficient with respect to certain requirements of the Commission's Regulations under the Federal Power Act.

The prepared testimony of Mr. John L. Dee, Manager of Tariffs, states that "1972 (Period I) recorded year revenues and expenses have been adjusted for average year conditions in order to determine overall increases in revenue requirements on the basis of average year conditions". In accordance with Section 35.13(b)(4)(iii), as amended July 17, 1973, by Order No. 487, you are hereby required to submit cost of service data containing *unadjusted system costs* for Period I. Any adjustments to Period I data that you desire to make should be shown separately. Also, to assist in the analysis of your filing,

please submit Statement H which is omitted from your submitted Period I data.

It is noted that in many cases your submittal does not include appropriate data to support your estimates for Period II; no work papers were submitted with your filing, and frequently sources of estimates or explanations of the methods utilized in preparing estimates are not included with the filing. Section 35.13(b)(4)(iii) of the Commission's Regulations provides that all filings shall include a full explanation of the basis of each of the estimated figures which constitute Period II data. Accordingly, you should submit work papers related to Statements A through O and a full explanation of the basis for each estimated figure.

With respect to the proposed fuel cost adjustment clause, it should be noted that Section 35.14(a)(2) provides that the base cost of fuel shall be stated in cents per million BTU. Please supply that figure and indicate how it relates to the current period fuel cost adjustment utilized in the formula for determining billing factor.

A filing date will not be assigned to your submittal pending receipt of the above requested information. Additionally, in your transmittal letter explaining the selection of calendar year 1972 for Period I and calendar year 1973 for Period II, you state that certain data are available only at the end of a calendar year. Please specify what data are not available except on a calendar year basis and how the lack of such data prohibits the use of a more recent test period.

Very truly yours,

Kenneth F. Plumb,
Secretary

cc: (See attached list of Addressees)
PWR

SOUTHERN CALIFORNIA EDISON COMPANY

P. O. Box 800
2244 Walnut Grove Avenue
Rosemead, California 91770

Telephone
213-572-1701

February 13, 1974

William M. Marriott
Manager of Revenue Requirements

Federal Power Commission
Union Center Plaza
825 North Capitol, N.E.
Washington, D.C. 20426

Attention: Mr. Kenneth F. Plumb, Secretary

Subject: Docket No. E-8570

Gentlemen:

This will acknowledge and respond to the Commission's letter of February 1, 1974, advising Southern California Edison Company of certain deficiencies in its rate change filing in subject docket. Under date of February 1, 1974, Edison transmitted to the Commission (actually lodged in the Secretary's office Monday, February 4, 1974) additional information and documentation relating to said filing which we believe would clearly cure any such actual deficiency. This additional material was prepared in an effort to anticipate any possible deficiency in order to minimize the possibility of any delay in getting the new rates into effect but is not intended to reflect any concession by Edison that the original filing did not substantially comply with the Commission's filing requirements.

The following is in specific response to the Commission's letter of February 1, 1974, requesting additional information:

1. With reference to Mr. Dee's statement in his prepared testimony implying that the 1972 (Period I) cost of service included in the filing was based on "adjusted" data we indicated in our transmittal of February 1, 1974, that such statement was an inadvertent error and that the 1972 (Period I) cost of service did, in fact, reflect recorded results for 1972. Reference to the various Statements for Period I contained in the filing clearly shows that such cost of service data is based on recorded data taken directly from Form No. 1 filed with the Commission for the year 1972. A revised page of Mr. Dee's prepared testimony correcting the inadvertent error was included in the transmittal to the Commission under date of February 1, 1974.

2. With respect to Statement N for Period I, Edison explained in its answer to motions to reject (pages 5-6) why it had omitted that section from the filing (acknowledging that the explanatory statement contained in the filing was in error). The calculations submitted by Cities as an attachment to their protest, petition to intervene, etc., indicating a 9.6% rate of return when applying 1974 rates to 1972 costs, while not correct, did illustrate the basis of Edison's concern that such information would be, at best, meaningless, and, at worst, misleading. However, in order to be in literal compliance and facilitate the new rates becoming effective at the earliest possible date, Edison included the Statement N data for Period I in the additional supplemental information it submitted to the Commission and mailed to the parties on February 4, 1974, transmitted by letter dated February 1, 1974. That material reflected a rate of return on resale of 8.8% based on the application of 1974 rates to 1972 costs, against demonstrating the basis for Edison's earlier concern and reason for omitting from the original filing.

3. With reference to work paper support and other adequate explanation for the 1973 (Period II) estimates included in the filing, we discussed this filing requirement of the Commission's Regulations at length in Edison's answer to motions of Cities and Anza to reject filing (pages 7-15) pointing out that, although we did not include a separate document in the filing designated "Workpapers," the filing contained extensive detail showing the development of the cost of service data in the filing and explaining the basis for the estimates. This included detailed backup sheets in the various statements reflecting the sources of data used and the development of the cost of service from that data as well as separate additional supporting documents. To be specific, we pointed out that:

a. Balance Sheet, income and earned surplus Statements A, B and C, respectively, contained recorded data for 12 months ending October 31, 1973, leaving only the effects of operations in November and December as the difference between that recorded data and estimates for 12 months ending December 31, 1973, the latter being affected by estimates included in cost of service statements for 1973, and support therefore.

b. Rate of return Statement G contained detail on Edison's cost of capital including complete statement of capital issues recorded as of December 31, 1973, the last issue having been made on October 17, 1973, and the estimated common equity as of December 31, 1973, reflecting the addition of $53.7 million retained earnings to the recorded retained earnings as of December 31, 1972 (Statement G, Period II, Sheet 1 of 5).

c. The other statements reflecting primarily the cost of service for Period II contain supplemental

schedules showing the bases for the detailed cost of service development, the statements themselves being part of this cost of service development support. Statement M, for instance, contains 8 schedules; Statement N, 3 schedules. In addition, since Edison used the revenue, expense and rate base estimates for the system, adopted by the California Public Utilities Commission ("CPUC") for 1973 in the recent CPUC decision in Edison's general rate proceeding involving retail rates, as the starting point for developing updated estimates of revenues, expenses and rate base for this filing, Edison included in this filing, as one of the "additional supporting documents", a copy of the CPUC Decision No. 81919 reflecting the development of estimates for those items submitted in that proceeding by Edison and the CPUC staff and the CPUC's detailed analysis of those estimates in that record leading to the adoption of such estimates.

d. In support of its fuel clause included in Statement O, Edison included not only calculation sheets showing the detailed development of the fuel cost adjustment billing factor for a given set of fuel cost conditions but included in the "additional supporting documents" Edison's detailed response to the Commission's proposed rulemaking in Docket No. R-479 concerning fuel adjustment clauses, the CPUC advice filing 375-E containing development of fuel costs on which the fuel cost in the base resale rates is based, CPUC advice filing 382-E containing development of fuel costs on which the fuel adjustment effective as to retail rates at the time of this filing was based, and a copy of CPUC Decision No. 79838 authorizing the fuel clause and fuel cost adjustment procedure now in effect as to Edison's re-

tail rates. The development of the base cost of fossil fuel in cents per M³ BTU under the fuel cost adjustment provision filed herein is shown for the three fossil fuels on Sheet 2 of 4 of Statement O for Period II with a summary of those base costs and composite calculation for the three fuels shown on Sheet 3 of 4. The latter is 69.87 cents per M³ BTU without including gas, oil handling and 71.06 (rounded 71.1) cents per M³ BTU including gas, oil handling of $5.9 million. The calculation of the latter unit fuel cost figure was not shown on Sheet 3 of the Statement O for Period II contained in the original filing so a revised sheet showing that computation is being attached to this response.

4. We have indicated above that the development of the base cost of fuel is shown on Sheet 2 of 4 of Statement O for Period II and summarized for the three fuels, gas, oil and coal, on Sheet 3 of 4. That base cost of fuel is utilized as shown on Sheet 3 of 4 to develop the total cost of fossil fuel for the current period at base cost ($377.5 million as shown on Sheet 3) to subtract from the total cost of fossil fuel at current cost (developed on Sheet 1 of 4) to compute the increased cost of fossil fuel to be allocated ($121.3 million as shown on Sheet 4). That difference is then allocated between system and off-system deliveries, the allocation to the latter reflecting the assumption that all off-system sales are generated using fuel oil. The balance (allocation to main system of $114.9 million as shown on Sheet 4) is then allocated between generation for retail and resale and the portion thereof ($8.94 million) allocated to resale (the ratio of 4793/61593 as shown on Sheet 4) is divided by resale sales (4,650 M³ KWH shown on Sheet 4) to develop the unit fuel cost adjustment billing factor of 0.192 cents per kilowatt-hour as shown on Sheet 4 for the November 1, 1973, adjustment. The foregoing calculation allocating

the current period fuel cost adjustment for main system illustrates the operation of the fuel cost adjustment formula: BF = FCA x GW/GT x 1/SW contained in Special Conditions 7 and 8 for the new R-1 and R-2 schedules, respectively.

The current adjustment applicable to retail rates went into effect on February 1, 1974. We have calculated the adjustment applicable to resale rates if the rate changes filed herein go into effect as proposed, based on the same fuel costs on which the retail fuel adjustment currently in effect is based. That adjustment, applicable to resale sales, is 0.639 cents per kilowatt-hour. The development of the new adjustment is shown in the attached Supplement to State O for Period II, which Supplement includes Sheets 1 through 4 and is based on fuel costs used to develop the billing factor which became effective February 1, 1974, as to retail rates.

5. It is Edison's position that its original filing did meet the substantial compliance test so far as the filing requirements contained in the Commission's Regulations are concerned. Cities' attacks on the filings as incomplete, we submit, are largely motivated by their desire to delay the effective date of the rate changes involved. Although we sincerely believed the original filing was clearly adequate to permit a meaningful preliminary analysis of the rate changes, and to support those rate changes, we submitted the additional material under date of transmittal of February 1, 1974, out of an abundance of caution to avoid any delay in getting the rate changes into effect, because of the gross inadequacy of the existing rates (indicated to produce less than 1% rate of return for 1974—Sample's prepared testimony, page 35 and exhibit referred to therein) and the urgent need to make a fuel adjustment clause effective in the face of current and expected further substantial increases in fuel costs.

In the same spirit of attempting to insure the adequacy of the explanation and support for the filing, to facilitate getting the rate changes made effective at the earliest possible date, we are transmitting herewith, and mailing to the resale customers, in addition to the supplemental fuel cost adjustment schedules (Statement O, Period II Supplement) based on current fuel costs, additional explanatory and supporting data which might be helpful to those who wish an even greater understanding of the details concerning the filing.

We emphasize that the submission of additional information under date of February 1, 1974, or herewith, is not to be construed as any concession on Edison's part that the original filing was not in substantial compliance with the Commission's Regulations. Rather, it is in recognition of the newness of the regulations setting forth the filing requirements and the difficulty of precise determination of just what is required in the way of "work papers" and sufficient "explanatory" information in support of the filing. If *all* of what might theoretically be considered "work paper" or "explanatory" data were to be identified it might fill a warehouse. But the regulations must contemplate exercise of reasonable discretion as to where the line is to be drawn. We believe the original filing was in substantial compliance with the regulations. Certainly the additional supplemental information supplied on February 4, 1974, was more than substantial compliance.

In view of the uncertainties involved in the definition of what is required by the regulations, of what constitutes substantial compliance, and of the urgent need of Edison to get the rate changes herein made effective just as soon as possible, including, indeed, the inequity to the retail customers who have been paying higher charges for electric service for sometime, and to the Edison stockholders who bear the burden of any contin-

ued subsidy in the form of inadequate resale rates, Edison, in responding to Cities' protest petition to intervene and "further" motion for rejection, petitioned the Commission to waive for good cause shown, the notice requirements or any deficiency in the filing that otherwise might preclude the rate change being made effective as proposed, and requested a minimum suspension (one day) if the matter is to be set down for hearing. Edison submits that good cause for such waiver and minimum suspension has been shown in terms of the inadequacy of existing rates, the critical need for a fuel adjustment clause in the face of current and continuing substantial increases in fuel costs, and the reasonableness of the new rates. Delays in making justified rate increases effective result in permanent loss to the stockholders of the utility. Rate increases subject to refund, at worst, result in current payment by customers of higher rates some of which *might* be subject to return to the customer if the Commission ultimately determines that such increases were to some degree too high. However, such refunds are made with interest which makes the customer essentially whole. Not so if the stockholder is denied the benefit of a justified rate increase. Yet, continued favorable investor attitude is essential if Edison's huge new capital requirements in the years ahead are to be met on reasonable terms.

Lastly, in further explanation of the fact that Edison's recorded costs are not available in a form to develop cost of service other than on a calendar year basis, we would advise, by way of example, the following:

(1) Maintenance indirects charged to accounts 510.01, 528.01, 541.01, 551.01, 568.01 and 590.01 during the year are reallocated, at the end of the calendar year, to other maintenance accounts on the basis of total charges to the maintenance accounts.

(2) Research and development expenditures are accumulated in account 930.00 during the year. At the end of each calendar year an analysis of the expenditures by projects is made and the appropriate expense account charged and account 930.00 credited.

(3) Costs for labor and expenses are accumulated throughout the year in functions which translate to account 920.00 and at calendar year end the amount, other than labor, is transferred to account 921.00.

Such items involve several millions of dollars and thus, while not affecting the overall results greatly, cannot properly be considered de minimus. Edison could change its accounting procedures or make estimates for periods other than calendar year periods but, in an effort to comply with the filing requirements contained in the Regulations, chose calendar year 1972 as the most recent recorded period.

The foregoing indicates why Edison believed a more recent period than calendar year 1972 was not feasible for use as Period I. As to the test year—which under the Commission's Regulations is Period II (§ 34.13(b)(4)(iii))—that can be any 12-month period commencing after the end of Period I and not later than the proposed effective date for the rate change. As we understand that requirement, if Edison's filing of calendar year 1972 is used for Period I and the rate change is proposed to be made effective March 1, 1974, Period II could be any 12-month period commencing as early as January 1, 1973, and as late as March 1, 1974. Calendar year 1973 would clearly qualify.

Edison submits that, based on the foregoing and its prior submittals herein, its rate filing in Docket No. E-8570 tendered for filing on January 2, 1974, should be

accepted for filing as of that date with a proposed effective date sixty days thereafter (March 3, 1974) and, if hearing is to be set thereon, suspended for one day to March 4, 1974, and then permitted to become effective, subject to refund with interest, as of that date, pending hearing and decision. We submit that any deficiencies in the filing should be waived or the 60-day notice period waived, for good cause shown, if the Commission does not conclude that the filing was in substantial compliance with the Regulations as of the date tendered, thereby, in any event, permitting the rate change to go into effect after minimum (one day) suspension on March 4, 1974, subject to refund.

Respectfully submitted,

SOUTHERN CALIFORNIA
EDISON COMPANY

/s/ William M. Marriott
WILLIAM M. MARRIOTT
Manager of Revenue Requirements
Richard A. Solomon, Esq.
Customers shown on attached list

WMM:ra

cc: Gregory Grady, Esq., FPC Staff
George Spiegel, Esq.

Appendix B-2c

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: John N. Nassikas, Chairman; William L. Springer and Don S. Smith.

Docket No. ER76-70

INTERSTATE POWER COMPANY

ORDER REJECTING PROPOSED RATE INCREASE AND DENYING WAIVER

(Issued September 10, 1975)

On August 13, 1975, Interstate Power Company (Interstate) tendered for filing certain proposed increased rates [1] for its transmission service to the Cooperative Power Association (CPA) in the State of Minnesota. Interstate states that the proposed rates would provide for an increase in revenues of $418,720 based on the test year of the twelve months ended December 31, 1974.

Notice of the proposed change in rates was issued August 26, 1975, with comments, protests, and petitions to intervene due on or before September 8, 1975. To date, no protests or petitions to intervene have been received.

Interstate's proposed increase is based on data for calendar year 1974. Thus, such data was over seven months old when filed. Section 35.13(b)(4)(iii) of our regulations provides that the cost of service in support of the increased rates should consist of the unadjusted system costs for the most recent twelve consecutive months for which actual data are available. We are not persuaded that the data for December 31, 1974 is the most recent available to Interstate. It was stale when filed. Furthermore, were we to suspend the proposed rate increase for the full statutory period of five months from the proposed effective dates of September 15, 1975, or until February 15, 1975, the rates would go into effect more than one year after the alleged costs upon which the rates are based were incurred. We do not believe that such stale data is an appropriate basis upon which to establish rates for the present or future. Accordingly, we shall reject Interstate's proposed increase, without prejudice to Interstate's right to file proposed increased rates with supporting costs from the most recent twelve consecutive months for which data is available, in accordance with the Commission's Rules and Regulations.[2]

Interstate did not explicitly request waiver of our regulations. We shall, however, treat the filing based on calendar year 1974 data as an implied request for waiver and deny it.

The Commission finds:

(1) Good cause exists to reject Interstate's proposed increased rates as filed on August 13, 1975.

(2) Good cause does not exist to grant waiver of Section 35.13(b)(4)(iii) of the Commission's Regulations.

The Commission orders:

(A) Interstate's proposed increased rates as filed on August 13, 1975 are hereby rejected, without prejudice to Interstate's right to file proposed increased rates with supporting data conforming to the Commission's Regulations.

[1] Supplement No. 1 to Rate Schedule FPC No. 88.

[2] See *Public Service Company of New Hampshire*, Docket No. E-9290, issued April 11, 1975; rehearing denied by order issued June 4, 1975.

(B) Waiver of Section 35.14(b)(4)(iii) is hereby denied.

(C) The Secretary shall cause prompt publication of this order in the Federal Register.

By the Commission

[SEAL]

Kenneth F. Plumb,
Secretary.

APPENDIX C

Commission's regulations nor embodied in its past practice but which the Commission, subsequently to filing, decided should be applied.

The basic question here is whether the Commission can impose a new filing requirement and apply it to pending rate increase applications without amending its filing regulations. The law is very clear that it cannot.

Before developing the law, we discuss briefly the character of the filing requirement invoked. There can be no doubt that a mechanical test of staleness (whether based on four months or seven months) is a new requirement. Order No. 487 adopting the existing regulations specifically rejected the use of a mechanical test for Period I based on counting back from the filing date of the rate. The order contemplated that a test based on the circumstances of the particular filing was to be used. The order, moreover, specifically endorsed the use of calendar year data, which a mechanical test would significantly limit. The Commission's application of the regulations promulgated in Order No. 487 conclusively demonstrates that no four month test or seven month test is implicit in them or was read into them before *Interstate*. To the contrary, the Commission's practice under the regulations demonstrates that they permit the use of back-to-back calendar years for Period I and Period II, with

APPENDIX D

§ 35.13(b)(4)(iii)

(4) (iii) The statement of the cost of service should contain unadjusted system costs for the most recent twelve consecutive months for which actual data are available (Period I) including return, taxes, depreciation, and operating expenses, and an allocation of such costs to the service rendered. The statement of cost of service shall include an attestation by the chief accounting officer or other accounting representative of the filing public utility that the cost statements and supporting data submitted as a part of the filing which purport to reflect the books of the public utility do, in fact, set forth the results shown by such books. Following is a description of statements A through O required to be filed pursuant to this subparagraph. In addition, the public utility shall file statements A through O together with related work papers based on estimates for any twelve consecutive months beginning after the end of Period I but no later than the date the rates are proposed to become effective (Period II). Full explanation of the bases of each of the estimated figures shall be included, Period II shall be the "test period".

APPENDIX E

Sec. 205(d), Federal Power Act, 16 U.S.C. § 824d(d)

(d) Unless the Commission otherwise orders, no change shall be made by any public utility in any such rates, charges, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published. [49 Stat. 851-852; 16 U.S.C. 824d(d)]

Sec. 313(b), Federal Power Act, 16 U.S.C. § 825*l*

(b) Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the United States Court of Appeals for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was en-

tered, as provided in section 2112 of Title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 346 and 347 of Title 28.

28 U.S.C. § 1254.

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented;

(3) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require

CERTIFICATE OF SERVICE

I hereby certify that I have this day served copies of this Petition for Writ of Certiorari in accordance with Rule 31 and 33 of the Supreme Court of the United States.

September 26, 1977
Washington, D.C.

CHARLES F. WHEATLEY, JR.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-476

TOWNS OF NORWOOD, CONCORD AND WELLESLEY, MASSACHUSETTS,
Petitioners,

v.

BOSTON EDISON COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR BOSTON EDISON COMPANY IN OPPOSITION

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WILSON - EPES PRINTING CO., INC. - RE 7-6002 - WASHINGTON, D.C. 20001

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BRIEF FOR BOSTON EDISON COMPANY IN OPPOSITION

COUNTERSTATEMENT OF THE QUESTION

Whether, as the Court of Appeals found, the Federal Power Commission (now the Federal Energy Regulatory Commission) erred by refusing to accept a rate for filing for failure to comply with a filing requirement that (1) had not been adopted—had not even been *proposed* to be adopted—until after the rate had been filed and (2)

shortly after having been proposed, but before adoption, was erroneously claimed to be already contained in existing regulations?

COUNTERSTATEMENT OF THE CASE

Factual background. In this case chronology is the crux of the matter. The facts are developed below in sequence:

1. In late 1972 the Commission concluded that historic test year ratemaking for the wholesale electric business was not working satisfactorily in the prevelant inflation and proposed to amend its regulations to provide for future test year ratemaking. 37 *Fed. Reg.* 28195 (1972). Under that proposal, there were to be two cost of service analyses: the analysis for Period I was to involve costs for the most recent 12 month period for which actual, experienced data were available; that for Period II was to involve estimated data for a future 12 month period beginning three months after Period I ended. Period II was to be the "test period"—that is, the rate was to be based on the Period II estimated cost of service—and Period I was to be solely a check on Period II. 50 F.P.C. 125-28 (1973).

2. Comments on the rulemaking proposal were due February 1973. 50 F.P.C. at 126. Some commenting utilities objected to the proposed three month gap between Periods I and II because they kept their books and developed forecasts on a calendar year basis and would find it difficult to develop cost of service analyses on a split test year basis (a 12 month test period spanning two calendar years). 50 F.P.C. at 128. The proposed three month gap, obviously, would eliminate the use of back-to-back calendar years for the two periods. Further, some commenting utilities asked that Period I be defined by a mechanical test—counting back a specified maximum number of months from the filing date of the rate to the end of the period. Some utilities recommended four months for such purpose; other suggested six months. 50 F.P.C. at 128. That proposal, too, would have interfered with the use of back-to-back calendar years for Periods I and II, since it would have meant that rates could be filed on such basis only in the early months of the year.

3. The Commission adopted future test year ratemaking in July 1973 in Order No. 487, 50 F.P.C. 125, *reh. denied*, 50 F.P.C. 736 (1973), *aff'd, American Public Power Ass'n* v. *FPC*, 522 F.2d 142 (D.C. Cir. 1975). It paid close attention to the definition of Periods I and II and to their time relation to one another and to the filing date of the rate change. It eliminated the three month gap between the periods that had been proposed in the notice of rulemaking and allowed Period II to commence at any time after the end of Period I but not later than the proposed effective date of the rate. That modification was made expressly in the interest of calendar year ratemaking: "This change will permit companies to file costs projected on a calendar year basis if they so desire." 50 F.P.C. at 128. As to the proposal for a mechanical test to define Period I, the Commission, again protecting calendar year ratemaking, said: "Our review of the comments which suggest changes to the proposed Period I does not alter our belief that Period I should be the most recent twelve months of actual experience." 50 F.P.C. at 128.

4. For nearly 26 months—from Order No. 487's promulgation on July 17, 1973 through September 3, 1975—the Commission applied the future test year filing requirements as promulgated in Order No. 487 without evident dissatisfaction. The previous calendar year was frequently used for Period I, and the four month and seven month mechanical tests that the Commission later

tried to read into Order No. 487 were not recognized. These are known cases in which the Commission accepted filings whose Period I was more than seven months old:

1. *Southern California Edison Co.*, 51 F.P.C. 951, *reh. denied*, 51 F.P.C. 1406, 1827 (1974), initial decision (unreported) issued September 13, 1976, Docket No. E-8570, pages 6-7; *see* certiorari petition here at 34a-45a.

   The rate was filed January 2, 1974, using calendar year 1972 for Period I. The Period I data were thus *12 months and two days old.*

2. *Louisiana Power & Light Co.*, 51 F.P.C. 1290 (1974).

   Filed February 4, 1974, the rate used the 12 months ended June 30, 1973 for Period I. The Period I data were thus *seven months and four days old.*

3. *Rockland Electric Co.*, Docket No. E-9001, September 27, 1974 order (unreported).

   Filed August 30, 1974, the rate used calendar year 1973 for Period I. The Period I data were thus *seven months and 30 days old.*

4. *Commonwealth Edison Co.*, 52 F.P.C. 1072, *reh. denied*, 52 F.P.C. 1864 (1974).

   The rate was filed August 30, 1974 using calendar year 1973 for Period I. The Period I data were thus *seven months and 30 days old.*

5. *Central Vermont Public Service Corp.*, Docket No. E-9040, December 5, 1974 order (unreported).

   The filing was made on September 27, 1974 and used calendar year 1973 for Period I. The Period I data were thus *eight months and 27 days old.*

6. *Montaup Electric Co.*, 52 F.P.C. 1865 (1974).

   Filed on October 1, 1974, the rate used calendar year 1973 for Period I. The Period I data were thus *nine months and one day old.*

It thus was well established that if a rate were filed in the late summer or fall of the year, the Period I analysis could be based on the preceding calendar year.[1]

5. Boston Edison Company ("Edison" or "the Company") commenced its preparation of its wholesale Rate S-4 filing in early 1975, as soon as the 1974 calendar year actual data were available. Relying on Order No. 487 and the Commission's then-established practice under that order, Edison selected back-to-back 1974 and 1975 calendar years for Periods I and II.

6. Edison's S-4 rate application was completed and filed on August 27, 1975. Period I was thus seven months and 27 days old when filed. Mr. Kelmon, Edison's witness sponsoring its cost of service data, stated in his prepared testimony submitted with the filing that the calendar year 1974 data were the most recent available actual data for 12 consecutive months.

7. However, in the summer of 1975, the Commission evidently had become disenchanted, for reasons never

[1] During this 26 month period the Commission refused to accept only two rate filings because of stale Period I data. In an early case, *Minnesota Power & Light Co.*, 51 F.P.C. 1422, *reh. denied*, 51 F.P.C. 2135, 52 F.P.C. 617 (1974), initial decision (unreported) issued September 1, 1976, Docket No. E-8494, the rejected data were ten months and 16 days old, which was less than some Period I data later found acceptable; however, the filing utility had volunteered in its filing letter that "if required by the Commission, the Company will prepare an updated cost of service presentation for Period I." Certiorari petition here at 25a. In the other case the Period I data were the oldest ever filed. Period I had ended 14 and a half months before the filing was completed; the Commission said that the 1973 test period was too stale and outdated to support rates for the future. *Public Service Company of New Hampshire*, Docket No. E-9290, April 11, 1975 order at 3, *reh. denied*, June 4, 1975 order. 5 Fed. Power Serv. 5-818.

fully articulated, with the flexible definition of Period I adopted in Order No. 487. On September 3, 1975, one week after Edison's Rate S-4 filing, the Commission initiated, with an innocuous-appearing notice of proposed rulemaking, what proved to be a dizzying series of filing requirement developments. 40 *Fed. Reg.* 42029 (1975). The notice of rulemaking stated that the Commission proposed to limit Period I to a 12 month period ending within four months of the filing date of the rate—one of the mechanical tests that it had explicitly rejected in Order No. 487. The notice forthrightly characterized the rulemaking proposal as an "additional requirement" not contained in the existing regulations, which, the notice said, did "not specify how current the actual data must be," were "ambiguous," had given rise to "varying constructions," required "subjective judgment" and were "open to interpretation." 40 *Fed. Reg.* at 42029. The notice made clear that the proposed rulemaking was primarily directed at back-to-back calendar year ratemaking, which, it said, resulted "in less recent data than if the company had utilized a split test year cost of service." 40 *Fed. Reg.* at 42029. The public were invited to comment on the rulemaking proposal by November 19, 1975. 40 *Fed. Reg.* at 42029-30.

8. On September 10, 1975, one week after the notice of proposed rulemaking was issued, the same day on which that notice was published in the Federal Register, and well over a month before comments were due, the Commission commenced *applying* the proposed four month test to tendered rate increase applications. In *Interstate Power Co.*, Docket No. ER76-70, September 10, 1975 (unreported, *see* certiorari petition here at 46a), the Commission refused to accept calendar year 1974 as Period I. It commented that the data were "over seven months old when filed" and were therefore "stale" (at 46a-47a). Refusals to accept other utilities' rate filings quickly followed under the *Interstate* precedent. The

utilities were instructed to refile under the proposed four month test. Despite the Commission's later claims to have uniformly applied a seven month test, it became clear beyond doubt that it was actually applying a four month test when, in *Arkansas Power & Light Co.*, Docket No. ER76-110, October 7, 1975 letter order (unreported, *see* Appendix A attached), it refused to accept a rate in which Period I had ended only five months and 18 days before the filing date.

9. On September 24, 1975 the Commission sent Edison a letter order stating that the Rate S-4 filing was "deficient" because the Period I data were "out of date." *See* certiorari petition here at 12a. The letter instructed Edison to "submit actual data for the period ending no earlier than four months prior to the date of filing of the proposed increase" (at 13a). The Commission simply noted that its action was "consistent with" the *Interstate* order of two weeks before and the notice of proposed rulemaking of three weeks before.[3] On October 15, 1975 Edison applied for rehearing of the Commission's refusal to accept Rate S-4 for filing on the major ground that *Interstate* imposed a new filing requirement before it was properly adopted in the rulemaking proceeding.

10. On October 29, 1975, while Edison's application for rehearing was still pending, the Commission introduced a new twist to its Period I policy in *Consumers Power Co.*, Docket No. ER76-45 (unreported order, *see* Appendix B), one of the cases refusing acceptance for filing under *Interstate*. The Commission in *Consumers Power* abandoned the four month test and substituted a seven month test. It sought to create the impression, however, that it had always been applying the seven

[3] Certiorari petition here at 13a. The Commission also cited its September 19, 1975 unpublished letter order to Ohio Power Company—its first application of *Interstate* as precedent. *Id.*

month test in *Interstate* and the cases that followed in its wake (at B-3):

> In the *Interstate* order, we were dealing with data that was 7½ months old and made the determination that such data was too stale to be "the most recently available" and therefore rejected Interstate's filing for failure to comply with Section 35.13(b)(4)(iii) of the Regulations. Since that action, we have consistently refused to accept rate filings containing Period I data which was more than seven months old.

The Commission cited no regulation or practice as the source of the seven month test. Nor did it explain how the test could be squared with its previous practice, under the same regulation, of accepting for filing rates in which Period I was more than seven months old.

11. Immediately after issuing *Consumers Power* the Commission moved to modify the actions that it had taken previously under the four month test. On October 31, 1975—two days after the *Consumers Power* order—it vacated its October 7, 1975 letter order in *Arkansas Power & Light Co.*, (Appendix A), in which it had rejected a filing in which Period I was five months and 18 days old, and accepted that rate for filing. *Arkansas Power & Light Co.*, Docket No. ER76-110, October 31, 1975 (unreported order, *see* Appendix C). The Commission proceeded to write to utilities that previously had been advised to resubmit their rejected filings in compliance with the four month test that they should comply, instead, with a seven month test. Edison received such a letter dated November 11, 1975. *See* certiorari petition here at 14a.

12. On November 14, 1975, the Commission denied Edison's application for rehearing. *See* certiorari petition here at 16a. Supporting the denial, the Commission merely observed, "Since . . . [*Interstate*], we have consistently refused to accept rate filings containing

Period I data which were more than seven months old" (at 19a).

13. Edison on November 19, 1975 appealed the Commission's deficiency letter order of September 24, 1975 and the order denying rehearing of November 14, 1975 to the D.C. Circuit in No. 75-2123.

14. The next development in the winding course of regulation was the Commission's issuance in the rulemaking proceeding, commenced almost five months before, of Order No. 545, Docket No. RM76-6, on January 20, 1976. 41 *Fed. Reg.* 3848 (1976). The Commission there rejected the four month test that had been proposed in the rulemaking notice and adopted, instead, the seven month test. The order, curiously, made the new seven month standard *prospectively* effective from the date of its publication. The order noted that the "present regulations are unspecific as to this time interval" and that, therefore, it was acting "to eliminate the current ambiguity." 41 *Fed. Reg.* at 3848-49.

15. Three days later, on January 23, 1976, Edison submitted to the Commission cost of service analyses for Periods I and II that complied with the requirements of the orders under appeal here. The Company requested the Commission to allow the filing to become effective thirty days after the submission of those analyses and, if the Commission chose to suspend the rate increase, to limit the suspension period to no more than four days, so that Rate S-4 could become effective on February 27, 1976, the date on which the rate increase would have become effective if the original filing had been accepted and suspended for the maximum five month period permitted by statute. The Company stated that if the Commission assigned that date as the effective date, its appeal would be mooted.

16. The Commission on February 20, 1976 accepted Rate S-4 for filing, treated January 23, 1976—the date

the updated Periods I and II data had been submitted—as the filing date and suspended the filing for the maximum statutory five months, until July 24, 1976. Edison's application for rehearing seeking a February 27, 1976 effective date was denied on April 12, 1976.

17. On April 26, 1976, Edison appealed the suspension order of February 20, 1976 and the order denying rehearing of April 12, 1976 to the D.C. Circuit in No. 76-1392. That appeal and the earlier appeal in No. 75-2123 presented identical issues and were consolidated for decision.

The decision below. The D.C. Circuit in *Boston Edison Co.* v. *FPC*, 557 F.2d 845, 848 (1977) stated the issue thus: "whether the Commission was acting within its authority in rejecting a rate filing already pending on 3 September 1975 [the date that the four month test had been proposed in rulemaking], which had been filed pursuant to then effective regulations." The court proceeded to hold that the Commission had abused its authority, and it remanded the case to the Commission with instructions to permit Edison's "S-4 rate filing [to] become effective as of 27 February 1976, five months from the filing date of 27 August 1975." 557 F.2d at 849.

Reciting the history of the Order No. 487 regulations and their application, the court said that "it is readily apparent that . . . calendar year cost-of-service data for Period I had been customarily received by the FPC in relation to rate increase filings." 557 F.2d at 848. It noted that "the earliest notice of any change in the standard was subsequent to petitioner's filing. . . ." 557 F.2d at 849. The heart of its rationale was this (557 F.2d at 849):

> Although an administrative agency is not bound to rigid adherence to its precedents, it is equally essential that when it decides to reverse its course, it must give notice that the standard is being changed, *Columbia Broadcasting System, Inc.* v. *Federal Communications Commission* [454 F.2d 1018, 1026 (D.C. Cir. 1971)], and apply the changed standard only to those actions taken by parties after the new standard has been proclaimed as in effect.

The court relied upon *Golden Holiday Tours* v. *CAB*, 531 F.2d 624 (D.C. Cir. 1976), for the proposition that a switch to a mechanical application of a filing standard after a continued pattern of relatively flexible application could be an arbitrary and abusive administrative act.

COUNTERARGUMENT

The petitioning Towns of Norwood, Concord and Wellesley, Massachusetts ("the Towns") offer two reasons that this Court should grant their petition for a writ of certiorari. First, they argue that the D.C. Circuit's decision runs counter to the judicial deference that is to be paid to administrative interpretations under *Udall* v. *Tallman*, 380 U.S. 1 (1965). Second, they claim that, even if the D.C. Circuit's decision on the merits was correct, its remedy—allowing Edison's S-4 rate to go into effect when it would have gone into effect except for the Commission's error of law—somehow permits "exploitation at the hands of utilities" (at 4).

I.

The Towns' reliance on *Udall* is misplaced. This Court there held that an administrative interpretation is entitled to judicial deference *in certain specified circumstances*. Those circumstances do not exist in the present case:

1. One condition of deference under *Udall* is that the wording of the regulation under judicial examination

create doubt about intent and that the administrative interpretation resolving that doubt *not* be "plainly erroneous" or "inconsistent with the regulation." 380 U.S. at 16-17. No such condition exists here. The Commission began asserting in September 1975 that its July 1973 Order No. 487 regulations contained a mechanical four month or seven month staleness test for Period I. The words of the regulations, however, made no reference to any such mechanical test; rather, they set out the more flexible test of "the most recent twelve consecutive months for which actual data are available." 50 F.P.C. at 130. Further, the order promulgating the regulations had made explicit that four month and six month mechanical tests had been considered and rejected in the rulemaking process in favor of the more "flexible" standard. 50 F.P.C. at 128. Thus, the Commission's interpretation asserted in September 1975 cannot be accepted as one of several possible readings of an unclear regulation; it was, instead, a reading contrary to the intent appearing both on the regulation's face and explained in its promulgating order. In that light the Commission's interpretation was about as "plainly erroneous" and "inconsistent with the regulation" as can be imagined.

2. A second condition of deference under *Udall* is that the administrative interpretation has been consistently applied. 380 U.S. at 17-18. But here the Commission's sudden claim in September 1975 to a four month or a seven month mechanical test was directly at odds with its interpretation of the Order No. 487 regulations for the preceding 26 months. During that period the Commission had accepted numerous filings in which Period I was more than four months old and at least half a dozen in which it was more than seven months old (see pages 4-5 above). The Commission prior to September 1975 never rejected for staleness *any* filing whose Period I was the age of Edison's Period I—between seven and eight months old (see note 1 at page 5 above). Thus, the Commission's September 1975 claim that the Order No. 487 regulations embodied a four month or seven month test was an abrupt reversal of its prior course of interpretation.[3]

3. *Udall* establishes that an administrative interpretation made contemporaneously with the promulgation of the regulation is entitled to greater deference than one made thereafter. 380 U.S. at 16. Here the Commission's first assertion that the Order No. 487 regulations contained a four month or seven month test was made some 26 months after their promulgation. The contemporaneous interpretation, by contrast, was that the Order No. 487 regulations embodied a "flexible" definition in preference to a mechanical test. 50 F.P.C. at 128. Two early applications of the regulations demonstrate that the Commission from the outset was operating under a flexible standard. Both cases involved a calendar year 1972 for Period I. In one case, *Minnesota Power & Light Co., supra*, 51 F.P.C. at 1422, the filing had been made on November 16, 1973, so that Period I (1972 data) was ten and a half months old; the filing utility, by offering in its submittal letter to file an updated Period I if the Commission so required, effectively admitted that the filed Period I was not the most recent

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[3] The Towns suggest (at 21-23) that the Commission may have applied a mechanical test all along, but simply waived the test in accepting certain filings; the acceptance orders, however, contain no language of waiver. In any event, routine, unexplained waiver would be the functional equivalent of a course of interpretation.

Further, the Towns assert that the Commission merely failed to enforce the seven month mechanical test in 1974 and that the Commission's temporary lapse cannot estop it from later enforcement. But, as shown in the factual background above, the flexible, case-by-case approach was not a temporary "lapse" occurring in 1974 for filings using 1973 for Period I; it was an articulated, consistently-applied approach from the promulgation of the regulations until the *Interstate* order in September 1975—that is, for nearly 26 months.

available. The Commission rejected the filing. 51 F.P.C. at 1422. In the second case, *Southern California Edison Co., supra*, 51 F.P.C. at 951, the filing was made on January 2, 1974, more than a year after the end of Period I. The filing utility, in response to the Commission's inquiry, explained that the 1972 data were the most recent available because certain of its data were kept only on a calendar year basis. *See* certiorari petition here at 44a. The Commission accepted the filing. If it had been operating under a mechanical four month or seven month test, it would have rejected the filing. Thus the Towns are inaccurate in asserting (no fewer than eight times in the course of their petition) that the "contemporaneous" construction found a mechanical seven month test in the Order No. 487 regulations.[4]

4. Under *Udall* an administrative interpretation commands judicial deference only if it is a matter of public record. 380 U.S. at 17-18. However, if, as the Towns contend, the Commission's "contemporaneous" interpretation of the Order No. 487 regulations was that they embodied a seven month mechanical test, that interpretation was certainly one of Washington's best kept secrets between 1973 and 1975. The words of the Order No. 487 regulations themselves did not suggest any mechanical test; the terms of the promulgating order explicitly rejected such a test; no later order articulated one; and no subsequent Commission action implied one. Indeed, subsequent Commission acceptance of older Period I data in various filings was inconsistent with any such test. Under *Udall* there is no deference due a professed administrative interpretation that has been kept as a private artifact of the agency.

[4] The Towns also are inaccurate in asserting (at 21) that the Commission "reiterated its seven-month criteria in 1975 in *Public Service Company of New Hampshire*." The Commission's orders in that case made no reference to a seven month test; the rejected Period I data were 14 and a half months old. 5 Fed. Power Serv. 5-818.

A Supreme Court case closer to the point than *Udall* is *Atchison, Topeka & Santa Fe Railway Co.* v. *Wichita Board of Trade*, 412 U.S. 800 (1973). There this Court held that an administrative agency has a "duty to explain its departure from prior norms." 412 U.S. at 808; *accord*, *Secretary of Agriculture* v. *United States*, 347 U.S. 645, 653 (1954). In effect, the *Atchison* case carves out an exception to the *Udall* rule of deference: when an agency reverses its sustained course of interpretation without explanation, it loses the claim to deference that it might otherwise assert. *See* K. C. Davis, *Administrative Law of the Seventies*, § 17.07-4 at 413-17 (1976).[5]

[5] *Atchison's* teaching that agencies must explain departures from prior norms has been one of the most potent, frequently-used doctrines of administrative law in recent years: *Chem-Haulers, Inc.*, v. *ICC*, No. 76-1488, slip op. at 11 (D.C. Cir. September 19, 1977) (Where the agency's decision "represents a change of policy, the Commission must vouchsafe its whys and wherefores . . ."); *Waterways Freight Bureau* v. *ICC*, No. 76-1598, slip op. at 12-13 n.11, 17 (D.C. Cir. July 1, 1977) ("Some explanation is due both the parties and the reviewing court when a decision is made that *conflicts* with relevant precedent."); *Pennsylvania* v. *ICC*, No. 76-1558, slip op. at 25-26 (D.C. Cir. June 20, 1977) ("When a reviewing court examines a change in agency policy, the key factor that guides the scrutiny is whether the policy change has been adequately explained and justified so that the parties upon whom the policy will have an impact understand the newly adopted agency position."); *The Second National Natural Gas Rate Cases*, Docket Nos. 76-2000, *et al.*, slip op. at 23 (D.C. Cir. June 16, 1977) (An agency's "change in policy must be avowed and reasoned"); *Continental Air Lines, Inc.* v. *CAB*, 551 F.2d 1293, 1303 (D.C. Cir. 1977) ("Reasoned decisionmaking requires an agency to explain changes of policy from past decisions and apparent inconsistencies within the same decision."); *International Union, UAW* v. *NLRB*, 459 F.2d 1329, 1341 (D.C. Cir. 1972) ("It is an elementary tenet of administrative law that an agency must either conform to its own precedents or explain its departure from them"); *Greater Boston Television Corp.* v. *FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971) (An "agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored . . .").

II.

The Towns' alternative ground for granting their petition for a writ of certiorari is that the D.C. Circuit's remedy is unfair and unlawful. That court remanded with instructions to allow Rate S-4 to become effective (subject to refund by Edison after hearing on the merits of the proposed increase) when it would have become effective, assuming the maximum five month suspension, if the Commission had not committed legal error in interpreting its filing regulations. 557 F.2d at 849. The Towns maintain (at 26) that, as "protected" entities, they cannot be required to "insure" against Commission error. They say that the risks of that error should be borne by the Company. But the court's remedy works no injustice and imposes no "insurance" obligation. The parties are merely returned to the positions that they would have occupied if the Commission had not erred in applying its filing regulations.

The propriety of such restitution is well recognized. As Mr. Justice Cardozo observed in *Atlantic Coast Line Railroad Co.* v. *Florida*, 295 U.S. 301, 309 (1935), the Supreme Court's decisions "have given recognition to the rule as one of general application that what has been lost to a litigant under the compulsion of a judgment shall be restored thereafter, in the event of a reversal, by the litigants opposed to him, the beneficiaries of the error." [*] The Court held that restitution was not required there only because it would offend equity in the particular "unique" circumstances of that case: a ratemaking order remedying a railroad rate discrimination had been vacated for lack of evidentiary findings, but the necessary findings had subsequently been supplied

[*] The D.C. Circuit "drew support" from that *Atlantic Coast* rule as recently as 1973, *Democratic Central Committee of the District of Columbia* v. *Washington Metropolitan Area Transit Comm'n*, 485 F.2d 786, 824 (1973), *cert. denied*, 415 U.S. 935 (1974).

and the error of the order, in effect, repaired. 295 U.S. at 314-16. Nowhere in the record was there any evidence that the rate discrimination found "illegitimate at one time" had been "innocent at another." 295 U.S. at 316. Therefore equity did not lie to grant the restitution.

In the absence of any such excusing circumstance, the courts have retroactively restored parties to their proper positions as relief from errors of law in ratemaking proceedings under both the Natural Gas Act and the Federal Power Act. In *Tennessee Valley Municipal Gas Ass'n* v. *FPC*, 470 F.2d 446, 452-53 (D.C. Cir. 1972), the customers had brought a complaint seeking reduction of an existing rate, a form of relief that under Section 5(a) of the Natural Gas Act can be granted only prospectively from the Commission's order on the merits. 15 U.S.C. § 717d(a) (1970). The Commission, after hearings, dismissed the complaint on the specious ground that the test period had become stale; then 112 days later, perhaps recognizing that the dismissal was indefensible, it reopened the proceeding. The D.C. Circuit found that the Commission's dismissal of the complaint had been legal error and, as a remedy, ordered the Commission to place any reduced rate into effect 112 days before the date of the order fixing the reduced rate. The court held that the "grant of retroactive relief for this period does not conflict with the anti-reparations language in the statute." 470 F.2d at 452.

In another case, *Indiana & Michigan Electric Co.* v. *FPC*, 502 F.2d 336, 343-48 (D.C. Cir. 1974), *cert. denied*, 420 U.S. 946 (1975), the court held that since the Federal Power Act explicitly provided for 30 days notice of a rate increase, the Commission by regulation could not extend the notice to 60 days; the court ordered the Commission to permit the rate filing involved in that case to become effective 30 days earlier than the

Commission had allowed.[7] Indeed, the D.C. Circuit applied its remedy here on the authority of *Indiana & Michigan*. 557 F.2d at 849. The relief granted in the present case—that the Company may collect monies that it might have collected except for the Commission's error of law—is thus well-founded in precedent.[8]

The Supreme Court in *United States* v. *New York Central Railroad Co.*, 279 U.S. 73 (1929), held that constitutional principle is not offended by making a rate, at the time of its determination, retroactively effective no earlier than the date of its filing. Mr. Justice Holmes said in that case (279 U.S. at 78-79):

> [T]he filing of an application expresses a present dissatisfaction and a demand for more. . . . If the claim of the railroads is just they should be paid from the moment when the application is filed.

The *New York Central* principle remains efficacious. *Transcontinental & Western Air, Inc.* v. *CAB*, 336 U.S. 601, 604-05 (1949); *United States* v. *CAB*, 510 F.2d 769, 774-75 (D.C.Cir. 1975). The D.C. Circuit decision that is

[7] The Commission had granted the statutory maximum five month suspension, but under the Court's decision on the merits that action had not been timely taken and the rate increase, by operation of law, had become effective without suspension. The Court, relying on equitable considerations, on rehearing disallowed restitution for the five month suspension period and permitted recoupment of one month's, rather than six months', increased revenues. In the present case, the court's relief is likewise predicated on a five month suspension of Edison's Rate S-4.

[8] The Towns cite two D.C. Circuit opinions holding that the risk of loss from a stay pending appeal in a proceeding to increase bus fares must be borne by the bus company (at 24-25 n.32). But the Towns overlook the D.C. Circuit's distinction between bus fare and utility rate cases on the subject of retroactive adjustment: "That no mechanism was provided [in the interstate compact for regulating bus fares] for retroactive adjustment of rates [*i.e.*, refunds] may well reflect the different problem presented by bus riders on the one hand, and gas or electric customers on the other." *Williams* v. *Washington Metropolitan Area Transit Comm'n*, 415 F.2d 922, 941 n.94 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1081 (1969).

sought to be reviewed here is entirely consistent with that principle: Edison has not sought to implement its rate increase for any period before its filing; in fact, under the D.C. Circuit's decision, 557 F.2d at 849, the rate increase would not be implemented until five months—the maximum statutory suspension period—*after* the date of its filing.

CONCLUSION

This case involves no departure from the law of *Udall* v. *Tallman* and presents no new or unsettled principle of restitution upon reversal of a legally erroneous decision of a lower forum. For those reasons, the Towns' petition for a writ of certiorari should be denied.

Respectfully submitted,

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October 26, 1977

APPENDICES

APPENDIX A

***Arkansas Power & Light Co.*, Docket No. ER76-110, October 7, 1975 letter order (unreported)**

Central Files (Public)

FEDERAL POWER COMMISSION
Washington, D.C. 20426

In Reply Refer to:
PWR-RC
Docket No. ER76-110
October 7, 1975

CERTIFIED MAIL

Arkansas Power & Light Company
Attention: Mr. O. V. Holeman
Director of Rates and Research
9th & Louisiana Streets
Little Rock, Arkansas 72203

Gentlemen:

By letters dated September 8, and September 18, 1975, you submitted for filing proposed rate schedules providing for increased rates applicable to your wholesale for resale customers. By letter dated September 24, 1975, you were informed that your filing was deficient with respect to certain requirements of Part 35 of the Commission's Regulations under the Federal Power Act. This is to inform you that your filing is also deficient as follows:

You provided Period I test data for the period ending March 31, 1975. Under Section 35.13(b)(4)(iii) of the Commission's Regulations, Period I data is required for the most recent twelve consecutive months for which actual data are available. Our review of your filing indi-

cates that because the Period I test data which you provided is out of date, we cannot properly evaluate the propriety of your proposed rate increase. Therefore, please submit actual data for the period ending no earlier than four months prior to the date of filing of the proposed increase. We note that this action is consistent with our Order Rejecting Proposed Rate Increase and Denying Waiver in *Interstate Power Company*, Docket No. ER76-70, issued September 10, 1975, our letter order in *Ohio Power Company*, Docket No. ER76-83, issued September 19, 1975, and our Notice of Proposed Rulemaking, Docket No. RM76-6, issued September 3, 1975.

We additionally note that your proposed rates are based on data for Period II, ending March 31, 1976. Therefore, pursuant to Section 35.13(b) (4) (iii) of the Commission's Regulations, which requires that Period II begin after the conclusion of Period I, revised Period II data should also be submitted.

A filing date will not be assigned to your submittal pending recepit of the additional requested information.

Very truly yours,

Secretary

APPENDIX B

Consumers Power Co., Docket No. ER76-45, October 29, 1975 order (unreported)

DC-24

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: Richard L. Dunham, Chairman; William L. Springer, Don S. Smith, and John H. Holloman III.

Docket No. ER76-45

CONSUMERS POWER COMPANY

ORDER DENYING APPLICATION FOR REHEARING

(Issued October 29, 1975)

On July 30, 1975, Consumers Power Company (CPC or Company) tendered for filing revised tariff sheets that would increase wholesale rates to certain partial and fuel requirement customers [1] by $5,065,720 based on sales for the twelve month period ending December 31, 1975. In response to public notice issued August 7, 1975, of CPC's filing, Twelve Publicly Owned Wholesale Customers (Systems) timely filed a petition to intervene, together with a motion to reject or, in the alternative, motion for summary judgment of that portion of the proposed rate increase attributable to comprehensive tax normalization and five month suspension of the remainder of the proposed increase. By order issued August 29, 1975 we, *inter alia*, suspended CPC's proposed rate increase for 30

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[1] See order issued August 29, 1975, in the subject docket for list of customers affected by the proposed rate increase.

days, denied Systems' motion to reject and provided for response to Systems' motion for summary disposition on the tax normalization issue.

On September 29, 1975, Systems filed an application for rehearing in part of our August 29, 1975, order. Systems contends that (1) a suspension period of five months, or at least longer than the 30 days imposed by our order, is justified in light of the "price squeeze" effect of the increase and alleged anticompetitive conduct of the Company, (2) the filing should have been rejected based on non-compliance with Commission regulations in CPC's alleged failure to file the most recent 12 months cost data and alleged failure to provide adequate work papers to support its cost of service and (3) that the "end result" of our order that "the Cities must pay the rates the Company asks" is unjustified.

Systems' first contention that a longer suspension period should have been granted renews two arguments presented in its earlier Motion to Reject in this docket. First, Systems states that "CPC has demonstrated a long-standing pattern of anticompetitive conduct" and this filing only furthers that pattern of behavior. Secondly, Systems argues that the Commission could avoid a wholesale-retail price squeeze by granting a five-month suspension period which would put Commission action on this wholesale rate increase more closely in line with the deadline for action on CPC's retail price increase now pending before the Michigan Public Service Commission. Our decision to suspend for 30 days was based on our review of CPC's filing and the testimony and exhibits in support thereof. Based on such review we exercised our independent judgment in light of our expertise in this area and concluded that a 30 day suspension was sufficient to protect the public interest and the parties to this proceeding. Upon further review, we reaffirm our prior order and conclude that the 30 day suspension was proper. The period of

suspension is a matter of discretion and not subject to judicial review. *Municipal Light Boards* v. *F.P.C.*, 450 F.2d 1341, 1352 (1971).

Systems second contention is that CPC has failed to file its most recent 12 months cost data and hence its filing must be rejected for non-compliance with Commission's Regulations under the Federal Power Act.[2] In support of this, Systems cites *Interstate Power Company*, Docket No. ER76-70, in which by order issued September 10, 1975, its filing was rejected on the basis of data over seven months old, and *Boston Edison Company*, Docket No. ER76-90, in which by letter order issued September 24, 1975, its rate increase filing was rejected based on similar data.

During the year 1975, we have accepted electric rate filing utilizing Period I data for the twelve months ended December 31, 1974, as meeting the filing requirement of Section 35.13(b)(4)(iii) of the Regulations that such data be ". . . for the most recent twelve consecutive months for which actual data are available. . ." However, we realized in so doing that at some point in time data for the twelve months ended December 31, 1974, would eventually become stale and thus outside any reasonable interpretation of Section 35.13(b)(4)(iii) of the Regulations which requires submission of the most recently available data. In the *Interstate* order, we were dealing with data that was 7½ months old and made the determination that such data was too stale to be "the most recently available" and therefore rejected Interstate's filing for failure to comply with Section 35.13(b)(4)(iii) of the Regulations. Since that action, we have consistently refused to accept rate filings containing Period I data which was more than seven months old. Accordingly, since Consumers has not reflected data

[2] Regulations Under Federal Power Act, Section 35.13(b)(4)(iii).

for Period I which is more than seven months from the date of its tender for filing, we shall deny Systems' motion to reject. We find that the Period I data contained in Consumers' filing is sufficient to meet the requirements of Section 35.13(b)(4)(iii) of our Regulations.

Finally, Systems contends that the "end result" of our order is "unjustified and unjustifiable" in that "the end result is that the Cities must pay the rates the Company asks." We believe that the public interest is protected in this respect by that provision of our order which places the rate increase into effect subject to refund pending the outcome of the hearing thereon. The issues raised by intervenors, such as rate-of-return and substantiation of cost-of-service studies, among other, can be best pursued at open hearing where a complete evidentiary record can be established to determine the lawfulness of the proposed rate increase. At that time, should any of the proposed increase be found not to be just and reasonable, CPC will be required to refund that portion of the rate increase collected pursuant to the conditions of our August 29, 1975 order with interest at 9% per annum.

For the reasons discussed above, we are of the opinion that Systems' application for rehearing of those parts of our August 29, 1975 order dealing with length of suspension period, acceptance of CPC's filing as submitted, and Systems' "end result" contentions contained therein should be denied.

The Commission finds:

Systems' application for rehearing filed September 29, 1975, in the subject docket presnets no new facts or principals of law which warrant modification of our order of August 29, 1975, in the subject docket.

The Commission orders:

(A) Systems' September 29, 1975, application for rehearing of our order of August 29, 1975 is hereby denied.

(B) The Secretary shall cause prompt publication of this order to be made in the Federal Register.

By the Commission.

[SEAL]

KENNETH F. PLUMB,
Secretary.

APPENDIX C

***Arkansas Power & Light Co.*, Docket No. ER76-110, October 31, 1975 order (unreported)**

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: Richard L. Dunham, Chairman; Don S. Smith, and John H. Holloman III.

Docket No. ER76-110

ARKANSAS POWER & LIGHT COMPANY

ORDER ACCEPTING FOR FILING AND SUSPENDING PROPOSED RATES

(Issued October 31, 1975)

On September 8, 1975, Arkansas Power & Light Company (AP&L) tendered for filing a proposed rate increase. Upon further review of the record in this proceedings, we find that the tendered filing, as supplemented by the data filed by AP&L on October 1, 1975, substantially complies with our filing requirements in Part 35 of the Regulations. However, the proposed rates and charges have not been shown to be just and reasonable. Accordingly, we shall accept for filing AP&L's tendered filing and suspend it until December 1, 1975, when it shall become effective, subject to refund. We shall establish hearing procedures by further order.

The Commission orders:

AP&L's September 8, 1975 filing, as completed on October 1, 1975, is hereby accepted for filing and suspended until December 1, 1975, when it shall become effective subject to refund.

By the Commission.

[SEAL]

KENNETH F. PLUMB,
Secretary.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77—476

TOWNS OF NORWOOD, CONCORD and WELLESLEY, MASSACHUSETTS,

Petitioners,

v.

BOSTON EDISON COMPANY,

Respondent.

MEMORANDUM OF THE READING MUNICIPAL LIGHT BOARD IN SUPPORT OF PETITION FOR CERTIORARI

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October 25, 1977

DI CESARE - Printing — 331-6101 — Washington, D.C. 20006

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77—476

TOWNS OF NORWOOD, CONCORD and WELLESLEY, MASSACHUSETTS,

Petitioners,

v.

BOSTON EDISON COMPANY,

Respondent.

MEMORANDUM OF THE READING MUNICIPAL LIGHT BOARD IN SUPPORT OF PETITION FOR CERTIORARI

The Reading Municipal Light Board, Reading, Massachusetts ("Reading"), a party below and a respondent here, supports the petition for writ of certiorari filed by the Towns of Norwood, Concord and Wellesley, Massachusetts

("the Towns") on September 26, 1977.[1] As the Towns note, there are two issues here of substantial consequence to the administration of the Federal Power Act, and to administrative law in general, quite aside from the fact that even those respondents supporting the result below will not be able to assert that the court below was correct in several of its assertions of "fact" logically essential to the result reached.

I.

The Towns correctly note that the court below, apparently upset with the general vacillation by the Federal Power Commission in recent years on many issues, has decided to impose its own views as to the meaning of a particular regulation, which views were contradictory to those of the agency. As the Towns note, such a result is contradictory, as well, to the teachings of this Court in *Udall v. Tallman*, 380 U.S. 1, (1965), and other cases, but the context of this case may not be entirely clear from the petition.

The FPC (and now its successor in interest, the Federal Energy Regulatory Commission ("FERC") sets wholesale electric and natural gas rates based upon a "test year" cost of service which accumulates all costs for a twelve month period so that the matching revenue level can properly be set by designated rates. By a rulemaking order in mid-1973, the FPC chose to alter its past practice of setting rates upon an actual twelve month period for which data were available, modified for known

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[1]Reading's limited financial resources did not allow for the incurrence of costs associated with a separate petition for certiorari. Reading, like the Towns, is a wholesale customer of Boston Edison Company ("Edison"), and, like the Towns, relied upon the apparent validity of an order of the Federal Power Commission ("FPC") rejecting a rate increase filing by Edison which did not comply with the terms of the governing regulation. Thus, Reading did not raise its rates to its citizen-consumers until the FPC permitted Edison's rate later filed in conformity with the regulation to go into effect. Edison, relying on the decision below, now seeks to extract from Reading nearly $800,000 which Reading did not collect from its customers.

changes, in order to set rates based upon twelve month data projected by the filing utility. Filing of Electric Service Tariff Changes, Order 487, 50 FPC 125, rehearing denied, 50 FPC 736 (1973), affirmed, *American Public Power Association v. FPC*, 522 F.2d 142 (D.C. Cir. 1975). In establishing the "future test year", however, the FPC chose to retain one crucial link to reality, to impose a brake on the imagination of those utilities filing for higher rates. In addition to the projected twelve months data for "Period II", which formed the basis for the "test year" upon which rates were to be set, the FPC required the filing of actual twelve months data to form a "Period I", which data was required to reflect "the most recent twelve months of actual experience". 50 FPC 128. Thus, the regulation in effect at the time of the Boston Edison filing here at issue, 18 CFR 35.13(b)(4)(iii) (1975), required, in this regard, that

> "The statement of the cost of service should contain unadjusted system costs *for the most recent twelve consecutive months for which actual data are available (Period I)* including return, taxes, depreciation, and operating expenses, and an allocation of such costs to the service rendered. The statement of cost of service shall include an attestation by the chief accounting officer or other accounting representative of the filing public utility that the cost statements and supporting data submitted as a part of the filing which purport to reflect the books of public utility do, in fact, set forth the result shown by such books." [Emphasis added].

50 FPC 130. It is this "Period I" tie to reality that was at issue in the decision below.

The court below held (so far as one can tell) that since the FPC had apparently accepted filings made by utility companies during 1974 with a Period I consisting of the "most recent calendar year" of 1973, that "these regulations permitted cost of service data of the most recent *calendar year* for Period I." 557 F.2d at 848. Thus, it held, the FPC had erred in rejecting the Edison filing at issue here because it did not conform with the requirement of the regulations that the Period I data be the most recent twelve months data available.

The difficulty was this rationale is twofold. First,it is based on "facts" that are twisted beyond recognition and wholly incorrect.[2] Second, and more importantly, the court below has expressly ignored the fact that in the only cases under this regulation in which the FPC addressed the issue at all, it had enforced its regulation in a manner consistent with its action which the court reversed. As the Petition points out, the only cases known in which the FPC has addressed this issue support the interpretation of the regulation by the FPC below which the court reversed. Thus, in *Minnesota Power & Light Company*, Docket No. E-8494 (December 6, 1973) and *Public Service Company of New Hampshire*, Docket No. E-9290, 5 FPC 5-818 (1975); the Commission expressed its view that the regulations required the most recent twelve month data available for purposes of the Period I tie to reality, and, of course, in its original rulemaking order, 50 FPC at 128, it refused to alter its regulations to allow Period I to be "the most recent calendar year" because

> "Our review of the comments. . . does not alter our belief that Period I should be the most recent twelve months of actual experience. With Period I so described, we will have the most recent available data with which to analyze the normality or abnormality of estimated costs vis a vis actual historical experience."

Consequently, and of substantial importance to regulation under the Federal Power and Natural Gas Acts, the court below

[2]Thus, for example, the Court of Appeals decision quotes (at 847) a section of Order No. 487 concluding that *Period II* data may be filed on a calendar year basis, and what must be an interpretation of a statement of inexperienced FPC counsel at argument that:

> "The FPC concedes that utility companies interpreted Order No. 487 to allow Period I cost of service data to be filed on a calendar year basis." (at 487-488)

to conclude that *Period I* data was permitted by the regulation to be on a most recent calendar year basis. As the Towns point out, however, Petition at pp. 5-6, the FPC, in setting up its future test year regulations, expressly *refused* to amend its regulations to allow Period I data to be filed on a most recent calendar year basis.

has effectively held that although the regulation itself was clear—that the tie to reality provided by Period I was required to be *the most recent twelve months data available*—the meaning of the regulation was reversed, to something expressly rejected in the promulgation of the regulation by previous inconsistent actions by the agency. So far as Reading can determine, this is the first time that a court of appeals has reversed an administrative agency holding that the agency could not enforce the plain meaning of its regulation because it had accepted inconsistent filings (without written ruling) in the past, and therefore that the regulated industry had a right to rely on the agency's non-enforcement of its regulation. If this standard were to prevail, given the recent past history of many agencies, (expressly including the FPC), no regulation or ruling would be enforceable. The fact of the matter is that the regulation was plain—it required the most recent twelve months data available to be filed as Period I. It is also clear that all parties knew that the Commission had, in promulgating the regulation under which Edison sought to extract several million dollars per year from its customers, refused to amend its proposed regulation to accept Period I data for the most recent calendar year unless that were also the most recent twelve months data available. All parties also knew, or should have known, of the Commission's orders in 1973 which rejected filings which were made with calendar year Period I data which was stale. In fairness, all parties also knew that, in the latter part of 1974, the Commission had accepted several rate filings which did not conform to the Period I regulations, having utilized calender year 1973 data for Period I. But Edison, since its attorneys were the same as the attorneys for Public Service Company of New Hampshire, should have known that the FPC, at the beginning of 1975, indicated its intention to enforce its regulation in refusing to accept the Public Service Company of New Hampshire filing on the grounds that its Period I was merely "the most recent calendar year for which the Company had data compiled", rather that "the most recent twelve consecutive months for which data were available". *Public Service Company of New Hampshire*, 5 FPS 818 (1975). In the Commission's last order in that case, issued on June 4, 1975, the Commission noted, in rejecting Public Service Company of New Hampshire's application for rehearing of the rejection of its February 1975 filing, at 5 FPS 819:

> "The Company's contention that those data offered do reflect costs for the most recent twelve consecutive months for which data are available is a strained construction of that phrase. Regardless of whether they have been converted into cost of service form, the more recent 1974 data are available. It has not been satisfactorily demonstrated that the 'undue delay' incurred in requiring the preparation of cost of service figures based on the more recent data cannot be overcome with an applied effort."

Similiarly, Edison has never done more than hint that perhaps its Period I data complied as filed. Of course, it would be difficult for it to do so, since at the time of the mid-August 1975 filing here, with calendar 1974 as Period I, it already had filed with the Securities and Exchange Commission on August 1, 1975, and forwarded to its shareholders, an extensive statement of results for the six and twelve months ending June 30, 1975, and had filed with the FPC itself by July 28, 1975, detailed Form 5 monthly reports of electric operations, income and revenue for all months through June 1975.[3] As in the case of Public Service Company of New Hampshire, Edison clearly declined to put the resources necessary to make a non-stale filing in this case because it obviously felt that the FPC was unlikely to follow its own regulations in this area.[4]

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[3]Edison also maintains an even more extensive internal reporting system for its officers which breaks down operation data in detail and is rarely more than a month behind actual results, a fact well known to all who have litigated against it.

[4]After the rejection here, Edison filed anew, on January 23, 1976, a filing with data less than four months old for Period I. It is also worth noting, in view of Edison's carefully worded statement in this regard, that when Edison was defending the Commission's Order No. 487 originally providing for "future test year" ratemaking, it asserted in its brief to the court of appeals in *American Public Power Association v. FPC, supra*, at p. 16, note 1, that the "typical chronology" under Order 487 would include a rate filing in April, using calendar year data for the just completed year for Period I.

While it may be unfortunate that the FPC had failed, in 1974, to enforce its regulations, we are not aware of any other case in which mere failure to enforce a clear regulation (which had already been interpreted both in the promulgation of the regulation itself and in contemporaneous orders), even for a period of a year, precludes an agency from doing so when it has never formally changed its view. The court below might well have held that the FPC could not legally have accepted the filings it did in the latter part of 1974 without explaining its reversal, but we find it difficult to understand how it could hold that an agency which does not, for a period, enforce the law or its regulations designed to protect one class is barred from again enforcing the law or its regulations simply because the class against which it was supposed to protect another has acquired an expectation—even a reasonable one—that the regulations or law will not be enforced.

II.

The remedy chosen here—even if the agency were wrong, as it was not—is a startling one. The court below held that, if the FPC had been wrong in rejecting the filing as not in conformity with its regulations, it would be ordered to make the filing effective on the date which, in its view, the Commission would have made it effective had it acted properly. Thus, Edison has filed for, and the FPC has permitted,[5] a mechanism to recover approximately $2 million which Edison asserts it did not recover but should have recovered between February 26, 1976, and July 23, 1976, when its filing, as updated, was allowed to become effective. The Towns correctly note the cases which hold that, in a situation where an agency is established to mediate between conflicting interest groups (here consumers and producers of electric power and energy), the consumers should not be forced to pay for the errors of the agency if it is later found that the agency allowed too little initially. See *FPC v. Tennessee Gas Transmission Co.*, 371 U.S. 145, 152-153 (1962). At the very least, the situation is analogous to that where a stay is granted by a court and later dissolved.

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[5]Subject to pending motions to stay and for rehearing and reconsideration, and subject to eventual refunds as to amounts over the rate determined to be just and reasonable.

CONCLUSION

For the reasons stated above, this Court should grant the petition for certiorari filed by The Towns. Reading believes this case to be appropriate for summary reversal on the papers which will be filed before the Court, but in any event, we believe it clear that there is error demonstrable here of a sort which can infect or defeat the entire regulatory process. As this court stated in *FPC v. Sunray DX Oil Co.*, 391 U.S. 9, at 47[6],

> "... although it is regrettable that the road which led to these ... requirements could not have been straighter, we hold that the Commission did not exceed its authority."

The road that led to the requirements there at issue was certainly no straighter than the road which led to the regulation enforcement which the court below reversed.

Respectfully submitted,

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[6]The Towns seem to have missed, in proofreading, the elision of a case citation from their petition at 23, which quotes *Sunray DX, supra*, at 47, rather than *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380 (1947), as the incorrect passage would suggest.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-476

TOWNS OF NORWOOD, CONCORD AND WELLESLEY, MASSACHUSETTS,
Petitioners,

v.

BOSTON EDISON COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BOSTON EDISON COMPANY'S RESPONSE TO READING MUNICIPAL LIGHT BOARD'S MEMORANDUM IN SUPPORT OF PETITION FOR CERTIORARI

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November 2, 1977

WILSON - EPES PRINTING CO., INC. - RE 7-6002 - WASHINGTON, D.C. 20001

TABLE OF AUTHORITIES

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BOSTON EDISON COMPANY'S RESPONSE TO READING MUNICIPAL LIGHT BOARD'S MEMORANDUM IN SUPPORT OF PETITION FOR CERTIORARI

Boston Edison Company ("Edison") here answers the memorandum of the Reading Municipal Light Board ("Reading") in support of the petition for a writ of certiorari of the Towns of Norwood, Concord and Wellesley, Massachusetts. Edison previously opposed the Towns' petition. Reading's memorandum supporting the petition was

not filed in time for Edison to respond in its previous opposition.

This case is not worthy of the Supreme Court's attention under the standards of this Court's Rule 19. The D.C. Circuit merely held that the Federal Power Commission (now the Federal Energy Regulatory Commission) could not impose new filing requirements on a utility after its filing had been submitted in accordance with existing filing requirements. That principle is consonant with existing law.[1] There is no conflict of authority among circuits on the subject and no conflict with decisions of this Court. There certainly was no departure below from the accepted and usual course of judicial proceedings.

Reading seeks to make the case "certworthy" by developing a theory of the D.C. Circuit's holding that cannot be found on the decision's face. Reading develops its theory along these lines:

The Commission, Reading says, was not applying a mechanical four month or seven month test of Period I staleness when it rejected Edison's Rate S-4 filing, but was merely applying the test as articulated in Order No. 487: whether the Period I data were the most recent available data for a 12 month period. 50 F.P.C. 125-30, *reh. denied*, 50 F.P.C. 736 (1973), *aff'd*, *American Public Power Ass'n* v. *FPC*, 522 F.2d 142 (D.C. Cir. 1975). Reading's argument appears to be that the Commission, in rejecting the filing, made a factual determination that any Period I data more than seven months old could not possibly be Edison's most recent available data. That argument necessarily rests on one or the other, or both, of two premises: (1) that the Commission applied the Order No. 487 test to the particular facts of Edison's

[1] *Mississippi River Fuel Corp.* v. *FPC*, 202 F.2d 899, 902-03 (3d Cir.), *cert. dismissed*, 345 U.S. 988 (1953); *Atlantic Seaboard Corp.* v. *FPC*, 201 F.2d 568, 571 (4th Cir. 1953).

filing; or (2) that the Order No. 487 test implied a four month or seven month mechanical test. The Commission's conclusion in that respect, Reading asserts (at 4), is "consistent with" the Commission's rejection of filings in two other proceedings, one in which the Period I data were over ten months old and the other in which they were over a year old.[2] Reading treats the Commission's acceptance of filings in at least a half dozen other proceedings in which the data were over seven months old as aberrations—mere unfortunate lapses of enforcement of the Order No. 487 test.[3] Thus, Reading reaches its own interpretation of what the D.C. Circuit actually held: that if an administrative agency lapses in the enforcement of its regulations, it is thereafter foreclosed from resuming enforcement (at 7). That, of course, is not what the D.C. Circuit said that it held. *Boston Edison Co.* v. *FPC*, 557 F.2d 845, 849 (1977).

The basic flaw in Reading's version of the D.C. Circuit's holding is that it is premised on a number of critical facts that do not exist here:

1. The Commission unmistakably was applying a mechanical four month test when it rejected Edison's S-4 filing. The rejection letter order said (certiorari petition at 12a-13a):

> Our review of your filing indicates that because the Period I test data which you provided is out of date, we cannot properly evaluate the propriety of your

[2] *Minnesota Power & Light Co.*, 51 F.P.C. 1422, *reh. denied*, 51 F.P.C. 2135, 52 F.P.C. 617 (1974); *Public Service Company of New Hampshire*, Docket No. E-9290, April 11, 1975, *reh. denied*, June 4, 1975, 5 Fed. Power Serv. 5-818.

[3] *Southern California Edison Co.*, 51 F.P.C. 951, *reh. denied*, 51 F.P.C. 1406, 1827 (1974); *Louisiana Power & Light Co.*, 51 F.P.C. 1290 (1974); *Rockland Electric Co.*, Docket No. E-9001, September 27, 1974 order (unreported); *Commonwealth Edison Co.*, 52 F.P.C. 1072, *reh. denied*, 52 F.P.C. 1864 (1974); *Central Vermont Public Service Corp.*, Docket No. E-9040, December 5, 1974 order (unreported); *Montaup Electric Co.*, 52 F.P.C. 1865 (1974).

> proposed rate increase. Therefore, please submit actual data for the period ending no earlier than four months prior to the date of filing of the proposed increase.

As authority for its rejection of the filing, the Commission cited its notice of proposed rulemaking, which had been issued three weeks before, inviting public comment on a new four month mechanical test and *Interstate Power Co.*, Docket No. ER76-70, September 10, 1975 (unreported; *see* certiorari petition at 46a), which had been issued a week after the notice of proposed rulemaking, commencing immediate application of the proposed four month test before its adoption. That the Commission actually was prematurely applying the four month test in the proposed regulations was conclusively demonstrated in *Arkansas Power & Light Co.*, Docket No. ER76-110, October 7, 1975 (unreported letter order; *see* Edison's opposition at A-1), in which it rejected a rate whose Period I had ended only five months and 18 days before the filing date.

2. The Commission's letter order rejecting Edison's filing and its subsequent order denying rehearing made no pretext of examining the particular facts of Edison's case to determine if the Period I data were the most recent available. The only evidence before the Commission on the availability of Period I data to Edison was the prepared direct testimony of Edison's witness Ralph M. Kelmon, submitted under affidavit with the filing. Mr. Kelmon testified that "Period I is calendar year 1974 which is the most recent 12 consecutive months for which actual data are available." Edison repeatedly cited Mr. Kelmon's testimony to the Commission and the D.C. Circuit in the litigation below. Reading's statement that "Edison has never done more than hint that perhaps its Period I data complied as filed" (at 6) is—to put it with restraint—inaccurate in the light of Mr. Kelmon's testimony and its use below. If Reading considers Mr. Kelmon's statement to be merely a "hint" that Edison's data "perhaps" complied with the Commission's requirements, one wonders what sort of statement it would be prepared to accept as a direct representation of that fact.[4]

3. There is no basis for Reading's implication that the Commission before *Interstate* had applied a four month or seven month limit as a kind of rule of thumb under the Order No. 487 test. Reading seeks support for a seven month limit in two cases, *Minnesota Power & Light Co.*, 51 F.P.C. 1422, *reh. denied*, 51 F.P.C. 2135, 52 F.P.C. 617 (1974) and *Public Service Company of New Hampshire*, Docket No. E-9290, April 11, 1975, *reh. denied*, June 4, 1975, 5 Fed. Power Serv. 5-818. In both cases the Commission rejected filings for staleness of Period I data. In *Minnesota* the Period I data were over ten months old; in *New Hampshire*, over 14 months old. Neither case said anything about a four month or seven month test. Reading thus is able to assert only that the cases are "consistent with" a seven month test (at 4). By that, Reading evidently means that the Commission *could* have been applying an unstated seven month test in each case. But then it could also have been applying an unstated eight month, nine month or ten month test, under none of which would Edison's S-4 filing have been rejected.

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[4] This Court would be misled if it were to accept Reading's representation (at least by implication) (at 6) that data submitted by Edison to the Commission and the Securities and Exchange Commission and maintained for internal reporting were capable of rapid development into a cost of service analysis meeting Commission standards. It took Edison a full four months to rework and refile its rate application after its rejection, although it had already performed significant parts of the work in the earlier filing and had every incentive to move as quickly as possible (it was potentially losing needed rate increase revenues for each day of preparation). The four months were met only by hiring outside consultants to develop computer applications and to take over much of the cost of service work—a step that Edison immediately realized was necessary when it received the advice that it must comply with a four month test.

More likely, it acted on the basis of the particular facts presented, as contemplated in Order No. 487. In *Minnesota* the filing utility had volunteered in its filing letter that "if required by the Commission, the Company will prepare an updated cost of service presentation for Period I"—in effect, an admission that more recent data were available. Certiorari petition at 25a. *New Hampshire* was the only case in which the Period I data were substantially over a year old, so that even a calendar year bookkeeping justification was foreclosed there. Neither *Minnesota* nor *New Hampshire* carry the freight of Reading's claim. No case exists prior to *Interstate* in which a rate was rejected for staleness of Period I data that were the age of Edison's Period I data or less.

4. Reading asserts that *Minnesota* and *New Hampshire* are "the only cases known in which the FPC has addressed this issue" of Period I staleness (at 4). Reading evidently has overlooked two cases in which the issue was explicitly addressed and the filing *accepted* over the wholesale customers' objections. In one of those cases the Period I data were one year and two days old; in the other, seven months and 30 days old. The two overlooked cases demonstrate positively that no four month or seven month test was implied in the Order No. 487 regulations. The facts are these:

(a) The first overlooked case, *Southern California Edison Co.*, 51 F.P.C. 951, *reh. denied*, 51 F.P.C. 1406, 1827 (1974), is particularly interesting because it offers an early interpretation of the Commission's Order No. 487 regulations.[5] Following close on the heels of *Minnesota*, it involved, like *Minnesota*, a 1972 test year. Read together, the two cases demonstrate that the Commission did not regard data that were over seven months old as inherently incapable of meeting the most recent data available test.

[5] Reading should have been aware at least of this case, since its attorneys represented the unsuccessful wholesale customers there.

The rate in *Southern California* was filed on January 2, 1974, so that the 1972 Period I was just over a year old. The Commission inquired of the filing utility why more recent Period I data were not available. The filing utility answered that three items of data were kept on its books only on a calendar year basis. Certiorari petition at 44a. Upon that representation, the Commission accepted the rate for filing. Applying for rehearing, a group of wholesale customers claimed staleness of the Period I data as a ground for rejection.[6] The Commission, explicitly noting the customers' contention "that Edison's rate filing fails to comply with the requirements of the Commission's Regulations and that therefore the rate filing should be rejected," denied the application for rehearing on the ground that the customers had "presented no additional information subsequent to our March 1, 1974 order to indicate that [Southern California] Edison has not met these requirements." 51 F.P.C. at 1407. The Commission's handling of this case establishes its original intention under its Order No. 487 regulations to proceed on the basis of the particular facts presented. If it had found a seven month test implicit in those regulations, it could not have acted as it did.

(b) The Period I staleness issue was also specifically addressed in *Commonwealth Edison Co.*, 52 F.P.C. 1072, *reh. denied*, 52 F.P.C. 1864 (1974). The filing was made on August 30, 1974; Period I was calendar year 1973, so that the Period I data were almost eight months old at the filing. According to the Commission's order in the case,

[6] The wholesale customers said in their March 29, 1974 application for rehearing in Docket No. E-8570 (at 4-5):

> It is apparent from SCE's February 13, 1974 letter to the Commission that the data for a much more recent period was available, it simply was not in a convenient form for filing. This is not sufficient justification for failure to comply with this regulation. Allowing SCE to use a stale Period I test year does not square with the Commission's stated intent to set rates based on a company's most current costs.

"The Cities allege that the filing by ComEd should be rejected because . . . it does not comply with § 35.13(b)(4)(iii) of the Commission's Regulations which requires Period I data to be supplied for the most recent 12 months that data is available." 52 F.P.C. at 1073. Answering the Cities, "ComEd argued that rejection would be erroneous on the ground it had not complied with § 35.13(b)(4)(iii) since ComEd had filed Period I data for the most recent period the data was available." 52 F.P.C. at 1073. On the question so posed, the Commission accepted the filing. Again, it could not have done so if it had thought that data over seven months old were necessarily not the most recent available data under the Order No. 487 test.

5. There were at least six cases in which the Commission accepted filings whose Period I data were more than seven months old. In the two cases discussed immediately above, *Southern California* and *Commonwealth Edison*, the Commission recited and rejected wholesale customers' complaints that the Period I data were stale. In the four others (see footnote 3 page 3 above), it evidently did not occur to the wholesale customers to claim staleness.[7] Nor did it occur to the Commission that the filings violated any seven month test implied in the Order No. 487 regulations. The Commission's acceptance of the six filings was not a matter of non-enforcement of a previously proclaimed regulation or standard. After all, Order No. 487 had explicitly rejected mechanical tests of Period I staleness in favor of the more flexible "most recent . . . actual data" formulation. 50 F.P.C. at 130. And no later rulemaking or interpretative order had proclaimed or applied a mechanical test prior to Edison's filing. The Commission's acceptance of the six filings, far from being an oversight, was a deliberate application of the Order No.

[7] In two of the four cases, *Central Vermont* and *Montaup*, the wholesale customers were represented by Reading's attorneys, to whom the implication in the Order No. 487 regulations of a seven month test evidently was not as clear then as it is now.

487 regulations consistent with their language and the descriptive terms of the promulgating order.

6. The D.C. Circuit therefore was not called upon to hold, and did not hold, that the Commission was barred from enforcing regulations by a past lapse of enforcement. Nor was it asked to substitute its interpretation of an ambiguous regulation for the Commission's interpretation. Rather, it was called upon to hold, and held, that "calendar year cost-of-service data for Period I had been customarily received by the FPC in relation to rate increase filings" and that "the earliest notice of any change in the standard was subsequent to petitioner's filing . . .". 557 F.2d at 848-49. In other words, the court merely applied the familiar doctrine that when an administrative agency "decides to reverse its course, it must give notice that the standard is being changed . . . and apply the changed standard only to those actions taken by parties after the new standard has been proclaimed as in effect." 557 F.2d at 849. *See Atchison, Topeka & Santa Fe Railway Co.* v. *Wichita Board of Trade*, 412 U.S. 800, 808 (1973); *Office of Communication, United Church of Christ* v. *FCC*, 560 F.2d 529, 532 (2d Cir. 1977).

7. Nor was the D.C. Circuit called upon to hold that, under the Order No. 487 regulations and their subsequent interpretation by the Commission, the preceding calendar year would be inevitably acceptable as Period I. Edison has not asserted that its Period I met the Order No. 487 requirements because it was based on the preceding calendar year; it has claimed that its filing meets the Order No. 487 requirements because the preceding calendar year data that it used for Period I were the most recent available for that purpose. The Commission's previous practice under the Order No. 487 regulations established that previous calendar year data would be acceptable if the filing utility could represent (as Edison could and did) that they were the most recent available data. Edison

relied upon those orders in preparing its filing. The Commission then reversed course and held as a matter of policy, without reference to the circumstances of particular cases, that any data more than four months or seven months old could not be represented as the most recent available. The D.C. Circuit held that such reversal, without notice or explanation, was an arbitrary and abusive administrative act. 557 F.2d at 849.[8]

That conclusion is reasonable on the facts presented. The case presents no new or unsettled issue of law. Therefore, the petition for a writ of certiorari should be denied.

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[8] Reading claims in its opening (at 2) that the D.C. Circuit committed "several" errors of fact, but, when it gets down to cases, alleges only one (at 4 n.2), which turns out to be a difference of legal conclusion rather than an error of fact. The facts stated in the opinion are correct.